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No. 1367

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

APOSTLES ON APPEAL.

THE CHARLES NELSON COMPANY (Claimant of the American Steamship "SANTA ANA," Her Tackle, Apparel, Furniture, Engines, Boilers and Machinery),

Appellant,

vs.

THE STANDARD THEATER COMPANY,

Appellee.

VOL. II.

(Pages 401 to 893, Inclusive.)

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

FILMER BROS. CO. PRINT, 1642 HOWARD ST., S. F., CAL.

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(Testimony of George A. L'Abbe.)

Q. Coming out of the forward hatch?

A. Yes, I think so.

Q. What efforts were made to extinguish the fire?

A. Every effort the crew could make and some of the passengers.

Q. Under whose directions was the fire extinguished?

A. Why, under the captain and the first mate.

Q. Now what, if any, efforts were made to put out the fire and what means were used?

A. Why, first water and afterwards steam.

Q. Where did they use the water and steam?

A. In the hold and—

Q. In the hold of the vessel?

A. Yes, whatever they call it, and then put down the hatchways, or whatever they call them, and put in steam.

Q. In the hold of the vessel? A. Yes, sir.

Q. Now, how long a time were the captain and mate, as you mentioned, engaged in putting water and steam into the hold of the vessel?

A. Why, the fire broke out, I think, on Friday, and three or four days—I think it was the fourth day that they opened the hatches and started to take out the stuff.

Q. Did you see the cargo after the fire was put out? A. Yes, sir.

(Testimony of George A. L'Abbe.)

Q. What condition was it in?

A. Well, it was charred and burned. I saw some cases of wine that was brought up that all the bottles was broken from the heat.

Q. What was done with them?

A. Why, thrown overboard, I guess, and a lot of provisions that I brought for myself.

Q. Now, you went on with that vessel to Cape Nome, did you? A. Yes, sir.

Q. And when did she arrive there, do you remember?

A. That is, I went on as far as Dutch Harbor with the vessel.

Q. You did not go on clear to Nome in her?

A. No, sir. There was still some smoke and steam, some trouble on board, and I wanted to get to Cape Nome ahead of the steamer and I went on to Nome from Dutch Harbor on board the "Valencia."

Q. And you reached Nome before the "Santa Ana" reached there, did you?

A. No. The "Santa Ana" reached there on Sunday morning and I reached there on Sunday night, but they had smallpox on the "Santa Ana" and she was sent on to Egg Harbor, and she did not return until about the 28th—somewheres along there. I

(Testimony of George A. L'Abbe.)

was in Nome about two weeks before the "Santa Ana" returned.

Q. She returned about the 28th of June, did she not?

A. I think so, somewhere about there. I got there on the 18th, and she returned on the 28th, or about that.

Q. Now, did she unload her cargo in Nome?

A. Yes, sir.

Q. Did you see the cargo after it was unloaded?

A. Yes, sir.

Q. What time did she get the cargo unloaded, do you know?

A. Well, our goods—I don't know as to all the cargo, but our goods, what I took special notice of was the wines and bar fixtures, that was all burned up. I looked at that. It must have been about the 29th or 30th of June—along there—or 1st of July.

Q. Did you examine the cargo after it was landed to see anything about the extent of the damage that had been done to it?

A. Well, I looked at our stuff and it was not good, you know, it was all—the most of it I looked at was burned up; you could not do anything with it.

Q. You did not examine it specially though, to ascertain the amount of damage, did you?

A. No, sir.

(Testimony of George A. L'Abbe.)

Q. And could you tell the amount of damage that was done to the cargo that belonged to the Standard Theater Company?

A. Well, what I saw, I was looking particularly at the bar fixtures and the wines, was no good.

Q. But you could not particularize, could you?

A. No, sir.

Q. Were you there at Nome at any time when any particular examination was made of this cargo for the purpose of ascertaining the extent of the loss? A. No, sir.

Q. You had gone away before that?

A. Yes, sir.

Q. Can you state the total value of the cargo belonging to the Standard Theater Company as it was put aboard the vessel here in Seattle?

A. I have figured it, but I can't state now.

Q. It is in these invoices, if you do not remember.

A. No, I do not remember now; the invoices will show that.

Cross-examination.

Q. (Mr. POWELL.) Now, I understood you to say, Mr. L'Abbe, that the fire lasted for three or four days. Is that correct as near as you can remember?

A. Yes. I think it started on Friday; it must have been smoking from the time they found the

(Testimony of George A. L'Abbe.)

smoke first until they put it out; it was three or four days, I think.

Q. Now, when they finally opened up the hatches after they had put the fire out, considerable of the cargo was taken out and thrown overboard, was it not? A. There was some of it, yes.

Q. Was some of that cargo that was thrown overboard of that belonging to you, or to the Standard Theater Company?

A. I could not say. I know they took out some wines, but the bottles were broken, and a lot of that stuff, but I do not know what they did with it.

Q. Did they take out some of your cargo?

A. Out of the hold after the fire was out?

Q. Yes.

A. They brought some of the wine up above—up on the deck.

Q. And what was the condition of it?

A. It was all broken up—the bottles were not broken, the corks were out, you know, and the steam—

Q. Were the cases charred? A. Yes, sir.

Q. Now, when they unloaded this cargo at Nome, I understand you to say it was in very bad condition. Did it show evidence of having come in contact with fire? A. Why certainly, yes, sir,

Q. How large a proportion of it was charred?

(Testimony of George A. L'Abbe.)

A. Well, I can't say as to that. I saw the bar fixtures, that is what I looked at closer than anything else, I saw the bar fixtures and the mirrors were broken and all the veneer was broken, you know.

Q. Now, you spoke of some of the wines and liquors. Now, those wines were mostly in cases, were they not, and the whiskies in barrels?

A. Yes, sir.

Q. And the beer was bottled beer in barrels?

A. I think so. I do not know anything about the beer.

Q. Well, had those barrels of whisky been charred any by fire? A. Yes, sir.

Q. And those cases of wine, had they been charred any by the fire?

A. Some of the cases that were brought up were burned pretty near through.

Q. Most of them had been charred by the fire or somewhat scorched by the fire?

A. I do not know that all of them were; what I saw was.

Q. How about the scenery there and lumber and furniture; had the fire gotten into that any?

A. I know nothing about that, I do not know. I know it burned the lumber and furniture some, but I do not know anything about that.

(Testimony of George A. L'Abbe.)

Q. How about the stage fixtures and hangings and scenery? A. I know nothing about it.

Q. Now, these provisions that you spoke of; were those meats, groceries and so forth, canned goods?

A. Yes, sir.

Q. Had the fire gotten into them?

A. Yes, sir.

Q. Those were put up in boxes, were they?

A. I think so. They are in boxes or sacks. I looked at the canned goods I expected to live on in Nome and the steam had opened them up.

Q. Had the fire gotten into them a little?

A. The steam.

Q. You do not remember whether these provisions had been on fire or not, the cases?

A. No, I did not notice. The boxes were broken open.

(Testimony of witness closed.)

Mr. A. L. VALENTINE, produced as a witness on behalf of libelant, having been first duly cautioned and sworn, testified:

Q. (Mr. BRINKER.) Mr. Valentine, where do you live now? In Seattle? A. In Seattle.

Q. Were you in Nome in June and July, 1900?

A. Yes, sir.

Q. Were you in business there at that time?

A. Yes, sir.

(Testimony of A. L. Valentine.)

Q. What business were you in?

A. Manager of the Nome Trading Company.

Q. What business was the Nome Trading Company engaged in? A. General merchandise.

Q. What kind of goods did you handle?

A. Groceries and provisions and boots and shoes and hardware.

Q. Did you handle any lumber?

A. Yes; we had some lumber.

Q. Did you handle any liquors or wines or beer?

A. No liquors.

Q. Was the Nome Trading Company of which you were the manager, in the wholesale or retail business, or both? A. Both.

Q. Now, during those months were you familiar with the wholesale prices of goods of the lines that were carried by the Nome Trading Company?

A. Yes, sir.

Q. I will ask you if you knew the wholesale price of groceries there at that time? A. Yes, sir.

Q. Did you know at that time the prices of groceries, the wholesale prices in Seattle?

A. Yes, sir.

Q. Now, can you state what the difference in the wholesale prices in Nome and Seattle were at that time of groceries of the class of goods you handled?

(Testimony of A. L. Valentine.)

Mr. POWELL.—Objected to as incompetent, irrelevant and immaterial.

A. Yes, sir.

Q. About what would be the difference in the wholesale prices?

A. About ninety per cent advance.

Q. That is on groceries? A. Yes, sir.

Q. Now, you handled hardware, you say there; was that builders' hardware? A. Yes, sir.

Q. And what was the difference in the cost of hardware of that kind?

Mr. POWELL.—Same objection as above.

A. Well, I could not state positively as to that.

Q. Well, as near as you recollect it; of course, we can't get at it exactly accurate.

A. Oh, it was something approaching a hundred per cent.

Q. Did you handle any playing-cards?

A. Yes, sir.

Q. I will show you Exhibit No. 74, a bill of playing cards, which shows the wholesale price in Seattle, and ask you to state what the wholesale price of the same kind of goods was in Nome at that time.

A. My recollection is 100 per cent advance.

Q. I will show you Exhibit No. 72 which is an invoice at Seattle prices of a lot of kitchen furniture,

(Testimony of A. L. Valentine.)

and ask you to state if you handled that kind of goods and what the wholesale value of those goods was at that time in Nome.

A. Yes, sir. We handled those. There was 100 per cent advance in these.

Q. Did you handle any tents or canvas?

A. No, sir, no tents.

Q. I will show you Exhibit No. attached to 71, for a lot of finishing lumber and ask you to look at that and see if you handled any of that class of goods—there are two or three bills pinned together there—and if so, what the wholesale price or value of those goods was in Nome at that time over the Seattle price?

A. The advance on lumber was four to five hundred per cent.

Q. Here are Exhibit No. attached to 71, for finishing lumber of the same general grade. I suppose your answer would be the same as to that?

A. This would be the same as the other.

Q. And here is Exhibit No. 72 attached to 71 for a bill of windows; did you handle anything of that kind?

A. Yes, sir, we handled windows.

Q. What would be the advance on them at wholesale?

(Testimony of A. L. Valentine.)

A. Well, it would be—it does not state the size of the windows here, but the advance is in the same proportion as regards the lumber.

Q. The finishing lumber? A. Yes, sir.

Q. You said you handled builders' hardware. I will show you Exhibit No. 70 for a bill of builders' hardware and ask you to state, if you can, what the wholesale value of that was up there at that time.

A. Well, the general advance was from two to three hundred per cent on that class of goods.

Q. Now did you handle any blank books and stationery of that kind? I will show you Exhibit No. 69, a bill from Lowman & Hanfords, and Exhibit No. 69 of the same class of goods from the same people.

A. No, we did not handle anything in this line.

Q. Neither the blank books nor the printed matter? A. No, sir.

Q. Now did you have any whisky there in barrels in your store? A. No, sir.

Q. Did you have any wines? A. No, sir.

Q. And you could not testify then as to the wholesale value of whiskies and wines?

A. No, sir.

Q. Did you handle any cash registers?

A. No, sir.

Q. Did you handle any toilet paper?

A. Yes, sir.

(Testimony of A. L. Valentine.)

Q. I will show you Exhibit No. 66 for some toilet paper, showing the Seattle price and ask you to state what the wholesale value of that would be up there at that time as compared with the Seattle prices?

A. There was 100 per cent advance.

Q. Now I show you Exhibit No. 65, a bill of groceries from Louch, Augustine & Company. You handled groceries and know the wholesale price of them? A. Yes, sir.

Q. State what the wholesale price of groceries of that kind and character would be at that time.

A. Well, the general average would be over ninety per cent. Some of it is considerably more, but none less than ninety per cent.

Q. You say it would average over 90 per cent?

A. I say the general average would be 90 per cent. Some of it would go to 200 per cent. Flour and such things as that was much higher in proportion.

Q. Now here in Exhibit No. 64 for another bill of hardware.

A. Those were 100 per cent advance.

Q. Did you handle metallic cartridges?

A. No, sir, no cartridges.

(Testimony of A. L. Valentine.)

Q. Did you handle any marlin or tarred rope, whatever they call it? A. No, sir.

Q. Here is another bill for paper. I will ask you if you know the wholesale value of the paper referred to in this Exhibit No. 61.

A. We did not handle any of that.

Q. Did you handle any tights? A. No, sir.

Q. Here is Exhibit No. 59 for some crash and aprons and towels and thing of that kind. Did you handle goods of that character? A. Yes, sir.

Q. What would be the wholesale value of those goods up there?

A. That is from one to two hundred per cent.

Q. You did not handle any bar fixtures or anything of that kind, did you?

A. Bar glassware.

Q. But you did not handle bars or back bars?

Q. Did you handle any pianos?

A. I had a piano on sale there. It was not a part of our stock.

Q. Did you know what the wholesale price of pianos was at that time?

A. I do not know as there was any market for them.

(Testimony of A. L. Valentine.)

Q. Was not any market?

A. I was unable to sell the piano I had until fall.

Q. You did not handle any cordials or things of that kind? A. No, sir.

Q. Did you handle any cigars?

A. Yes, sir.

Q. I show you Exhibit No. 55 and ask you to state, if you know, what the wholesale value of that class of goods was in Nome at that time?

A. My recollection is that cigars was about fifty per cent advance at that time.

Q. Did you handle any chloride of lime, paraffine or things of that kind or character?

A. No, sir.

Q. Here is Exhibit No. 48 for what appears to be corrugated iron. Did you handle any goods of that character? A. Yes, sir.

Q. What was the wholesale value of goods of that class there above the outside price?

A. I have just forgotten what it was; I remember the price very distinctly, the price was eight cents a square foot on corrugated galvanized iron in eight foot lengths, but I do not understand just exactly how that bill is made out, but the price was eight cents a square foot, wholesale price at Nome.

(Testimony of A. L. Valentine.)

Q. Did you handle any sewer pipe, things of that kind? A. No, sir.

Q. For making chimneys?

A. Oh, yes, we handled terra cotta.

Q. Is that what you call it? A. Yes, sir.

Q. I show you Exhibit No. 47 a bill from the Denny Clay Company, and ask you if you handled any of that kind of goods? A. Yes, sir.

Q. What was the wholesale value of those goods up there as compared with Seattle prices?

A. Well, it was about 300 per cent advance.

Q. I show you Exhibit No. 46 bill for some Victor air-tight heaters and ask you to state whether you handled anything of that kind? A. No, sir.

Q. And you say you handled no tents?

A. No tents.

Q. Here is Exhibit No. 44 for another bill of iron. I will ask you to state what the wholesale price of that was as compared with the Seattle price.

A. We did not handle anything of that kind.

Q. Did you handle any gambling tools, anything of that kind? A. No, sir.

Q. Did you handle any mineral water?

A. Yes, sir.

Q. I will show you Exhibit No. 41 for ten cases of Manitou mineral water and ask you to state, if

(Testimony of A. L. Valentine.)

you know, the wholesale price of goods of that character up there at that time?

A. There was about 125 per cent advance.

Q. Did you handle furniture and carpets and blankets and chamber suits, bowls and pitchers?

A. We handled no furniture of that description.

Q. You did not handle any mattresses?

A. No mattresses.

Q. Did you handle blankets and oilcloth?

A. We had blankets.

Q. I show you Exhibit No. 39, which is a bill for twelve pairs of blankets and some oilcloth. Do you know the wholesale value of that up there? If so, you may state it.

A. The bill is a little indefinite, but there was from one to two hundred per cent advance on that class of goods.

Q. Did you handle any electrical appliances, enunciators? A. No, sir.

Q. Did you handle door locks, drawer locks and so forth? A. We handled door locks.

Q. I show you Exhibit No. 34 and ask you to state whether you knew the value of that class of goods up there at that time and if so what it was as compared with Seattle prices?

(Testimony of A. L. Valentine.)

A. I know on all hardware there was an advance of 100 per cent.

Q. Did you handle any rope of any kind, manila rope? A. Yes, sir, we had some rope.

Q. I show you Exhibit No. 33 which is a bill for manila rope, and ask you to state what the wholesale value of that was.

A. About 75 per cent advance on rope.

Q. And you handled sand paper?

A. Yes, sir.

Q. And marlin? Thereis Exhibit No. 30, a bill for some marlin and sand paper; marlin I understand to be this marlin twine, I do not know exactly what it is.

A. Oh, there about 200 per cent advance as to the said paper; as to the marlin I could not state what it was.

Q. Here is Exhibit No. 28 for a bill for glue and hinges and bolts and washers and peavies—maple peavies; did you handle that kind of goods, and if so, do you know what the wholesale value of that was there?

A. I was familiar with the hinges. There was 200 or 300 per cent on them.

Q. How about the other items on there?

(Testimony of A. L. Valentine.)

A. I would not be able to testify. We handled nothing of that character.

Q. The machine bolts and washers?

A. No, we did not handle any bolts.

Q. Here is Exhibit No. 25 for a lot of builders' hardware, it appears to be door handles, dead locks and latches and so forth. Did you handle that class of goods?

A. On a general average it would be 200 to 300 per cent.

Q. Did you handle any sheet-iron stoves?

A. No, sir.

Q. Did you handle any beer in bottles?

A. No, sir.

Q. Did you handle any fire extinguishers?

A. No, sir.

Q. Now here is Exhibit No. 29 for a lot of bar glassware and glassware of various kinds. I will ask you if you handled anything of that kind, and if so, to state what the wholesale value would be, if you know. A. Yes, sir; about 200 per cent.

Q. Now, here is Exhibit No. 19 for a lot of vermilion and various kinds of paints, resin, varnish and so forth. Did you handle anything of that kind?

A. About 150 per cent advance.

(Testimony of A. L. Valentine.)

Q. You did not handle any gambling outfits?

A. No, sir.

Q. Exhibit No. 17 for a lot of doors. I will ask you if you handled anything of that kind and if so what the value would be up there wholesale?

A. The price is indefinite here; there are no extensions made of the doors, just a lump sum of eighty dollars.

Q. But the sizes of the doors are given there and price of the doors. What would be the wholesale price there as compared with this price here?

A. There was about 300 per cent advance on doors over Seattle prices.

Q. Did you handle any printed tickets or anything of that kind? A. No, sir.

Q. Did you handle any rubber stamps or rubber goods? A. No, sir.

Q. I show you Exhibit No. 14 a bill for dusters and brooms and so forth. Did you handle goods of that character? If so, state what the wholesale value was there.

A. There was about 100 per cent advance.

Q. Did you handle any gold scales and weights and appliances, scoops, and so forth for gold scales?

A. We had gold scales, but as to the value—they were not worth as much there as they were here in

(Testimony of A. L. Valentine.)

the open market. The market was overstocked there and I would be unable to testify on that.

Q. Here is Exhibit No. 9 for a lot of stage hardware. Did you handle anything of that kind?

A. No, sir.

Q. Could not tell what the value of that would be? A. Could not tell anything about it.

Q. Did you handle any iron skeleton safes?

A. No, sir.

Q. Now I will show you Exhibit No. 3 and 4 for a lot of lamps and lamp chimneys and ask you if you handled any goods of that character and can state the wholesale value of them at that time; those, I understand to be those Rochester lamps?

A. About 300 per cent advance.

Q. Now, I show you Exhibit No. 2 for a lot of muslin, calico and things of that character, and ask you if you handled goods of that character, and if so, what the wholesale price was there at that time?

A. That depended a great deal upon the nature of the goods; from 100 to 200 per cent advance.

Q. Did you see the cargo of the "Santa Ana" after it was unloaded up there? A. No, sir.

Q. Did you have any goods in that shipment?

A. No, sir.

(Testimony of A. L. Valentine.)

Q. Did you see the cargo of the Standard Theater Company after it was unloaded and placed in their tent upon the same street you were on—what was that called—Second Street?

A. That was First avenue. I did not see any of their goods.

Q. You did not examine them then?

A. No, sir.

Cross-examination.

Q. (Mr. POWELL.) Now, Mr. Valentine, how long were you in Nome?

A. I was in Nome about three years and a half.

Q. When did you first go there? A. 1900.

Q. What time in the year 1900?

A. Landed there on the 26th of June, 1900.

Q. Now, when did you first come to be manager of the Nome Trading Company?

A. About the 26th of March, 1900.

Q. That was before you went up there?

A. Before I went to Nome.

Q. Where were you before you went to Nome?

A. In Seattle.

Q. Now, the knowledge you obtained of the values of these various kinds of goods you have testified

(Testimony of A. L. Valentine.)

to about, you gained after you went to Nome in June, 1900, did you not?

A. As regards Nome prices, yes.

Q. Yes, that is what I mean. Now, I notice that you testify that the advance on lumber over Seattle prices was at Nome 400 to 500 per cent, and you say that the advance on blankets over Seattle prices was from 100 to 200 per cent, and the advance on crash, aprons and towels from 100 to 200 per cent. Now do you mean to say that 100 per cent is as near as you can come to telling what the wholesale price of those various articles was, or do you mean to say that the wholesale price of those articles at that time fluctuated anywhere between those per cents?

A. As near as I could testify from the bills there, not specifying the article, is why I testified in that way.

Q. Now, the first invoice that you were asked about was one on groceries in which you say that the advance was about 90 per cent. Now, do you mean that all groceries were at an advance of 90 per cent or that in your opinion the general average of prices of an ordinary grocery stock would run about 90 per cent over Seattle prices?

A. The general average, yes, sir.

Q. How long before you took charge of the office at Nome before you became familiar with the Nome

(Testimony of A. L. Valentine.)

prices of the various articles in which the Nome Trading Company dealt? How long did it take you to familiarize yourself with the general run of Nome prices? A. Oh, perhaps two weeks.

Q. Now, what are you testifying to here, as you understand it, to the wholesale prices at Nome, or the retail prices at Nome?

A. Well, there was scarcely—there was one price really. There was scarcely a retail price or a wholesale price, there was scarcely a distinguishing feature.

Q. Was there any stable market price to any of these goods in the summer of 1900 at Nome?

A. Let me understand you correctly.

Q. I will frame my question differently. Is it not a fact that the prices of all kinds of goods at Nome fluctuated from week to week and almost from day to day during the summer of 1900?

A. Yes, in a great many instances.

Q. A vessel would come in laden with a great amount of a certain class of goods and the market would go to pieces, would it not?

A. Not during June and July.

Q. Did not the market go all to pieces, the market on whiskies, for instance?

A. Yes, it did on whiskies.

(Testimony of A. L. Valentine.)

Q. About what time in the summer did that occur?

A. Well, I think perhaps that was in July, but not dealing in liquors I have no personal knowledge any more than it is my understanding.

Q. Did your company ship up there any cargo of liquors at all?

A. We shipped them up, but I did not handle them.

Q. Well, what was the reason for their not putting them on the market?

A. We understood that the market was flat and in a dilapidated condition.

Q. And what time was this, about what time in the summer?

A. That was in July and August.

Q. Was not that true of all kinds of liquors, as well as whiskies? A. I would think so.

Q. Now, how about cigars; was the market for cigars fairly stable during the summer of 1900?

A. No; there was very little sale for cigars; that is, that is my experience with them.

Q. Now the next invoice that you asked about was Exhibit No. 18 for playing cards. This invoice is for 25 gross of bicycle cards and one gross of Brown snowflakes—faro cards. What was the

(Testimony of A. L. Valentine.)

wholesale price, per gross of bicycle cards in Nome in June and July, 1900?

A. Forty-eight dollars.

Q. And Brown snow flakes?

A. Well, about the same.

Q. Now, the next was an invoice of, I think it is, kitchen furniture, Exhibit 72, composed of a number of items, flour dredger and a tea kettle and coffee pot and sauce pans and frying pans and can opener and spoons and so forth. Now you do not know what the price of each one of those particular articles at Nome was, do you, Mr. Valentine, but you are giving what in your judgment would be the advance price over the local price on articles of that kind?

A. Yes, sir.

Q. The next was Exhibit No. 71 for some lumber. What did lumber wholesale for at Nome in the summer of 1900 per thousand?

A. From one hundred to a hundred and fifty dollars a thousand.

Q. Did it make any difference what the quality of the lumber was?

A. It depended on the quality, whether it was rough or planed, surfaced or—it made a vast amount of difference.

Q. It did make? A. Yes, sir.

(Testimony of A. L. Valentine.)

Q. Well, what would the rough lumber wholesale at, unplaned?

A. Seventy-five dollars, I think.

Q. And what would the finishing lumber wholesale at? A. One hundred and fifty dollars.

Q. Now, I presume that the prices of windows there would be determined somewhat upon whether the sizes were marketable sizes, would it not?

A. Yes, sir.

Q. Now, Exhibit No. 70 is a bill for various kinds of hardware, such as planes and babbitt planes and chisels and mallets and hand-saws and rip-saws and buck-saws—tools, probably. Now, do I understand you to say, Mr. Valentine, that you could tell now what the wholesale value of each of those specific items was at Nome at that time, or that in your judgment the advance over the local price here would be a certain per cent.

A. It is the advance over the general average here.

Q. Now, that is true in general of all of your testimony where you have testified that the advance over Seattle prices was at Nome a certain per cent?

A. Yes, sir.

Q. You do not mean to be able to remember now what the wholesale price of a definite article was?

A. No, sir.

(Testimony of A. L. Valentine.)

Redirect Examination.

Q. (Mr. BRINKER.) Mr. Valentine, you said that along in the latter part of July and August the market fluctuated in Nome on liquors and wines; that liquors came in there on vessels and you had a cargo brought up there which you sent back because the market was unsettled. Now, let me ask you whether the dealers in liquors at wholesale, such as the Alaska Commercial Company, the Northwestern Commercial Company, the N. A. T. & T. Company, the Ames Commercial Company, and the United States Commercial Company, whether those companies that were established in business there changed their prices to meet the prices of those stocks that were thrown on the market there for various reasons?

A. I could not say.

Q. You do not know about that?

A. No, sir.

Q. A great many stocks of goods that came up there were sacrificed because of the inability of people to get a place to put them, were they not?

A. Yes, sir.

Q. Do you remember the O'Connor stock that came up there? A. No, I do not.

(Testimony of witness closed.)

Mr. T. S. URQUHART, a witness on behalf of libelant, recalled for

Cross-examination.

Q. (Mr. POWELL.) Mr. Urquhart, you were in Nome in the summer of 1900, I believe you testified that you were? A. Yes, sir.

Q. What business were you engaged in there?

A. Saloon business.

Q. You were in the wholesale liquor business?

A. No, sir, retail.

Q. Where did you obtain your supplies during that time?

A. Generally around town, the A. C. Company principally.

Q. Did you have occasion to buy any goods there during June and July of that year?

A. Yes, sir.

Q. You testified on direct examination that the price of wines, liquors and cigars fluctuated at Nome during June and July of that year. What was the cause of that fluctuation, Mr. Urquhart?

A. Why, I think July landed quite a quantity of that character.

Q. Is it not a fact that people came in there and landed cargos of liquors that were difficult to dispose of at cost price without any profit?

A. Not in June; no.

(Testimony of T. S. Urquhart.)

Q. Well, is not that true in July?

A. Later on in the summer there was quite a pile of that stuff came in town; still prices were pretty well up on liquors and stuff.

Q. What was the price of liquors there along in the latter part of the summer, whiskies, for instance?

A. Well, they run from four and a half to five dollars a gallon.

Q. In the latter part of the summer?

A. Yes. They kept up pretty well all summer.

Q. You were there when the "Santa Ana" came into port with this cargo belonging to the Standard Theater Company? A. Yes, sir.

Q. Do you know what they finally did with their cargo of whiskies?

A. I think they disposed of some of it around town.

Q. At what time?

A. I do not know. They were there, I guess, the biggest part of the summer. I bought most of my stuff direct from the A. C. Company.

Q. (Mr. BRINKER.) By the A. C. Company you mean the Alaska Commercial Company?

A. Yes, the Alaska Commercial.

Q. (Mr. POWELL.) Now, you testified on direct examination that that piano that the Standard Theater Company had would be worth possibly, in

(Testimony of T. S. Urquhart.)

your judgment, four hundred dollars. Now, you do not pretend to have any knowledge, do you, Mr. Urquhart, of the actual wholesale selling price of pianos of that make at Nome at that time, do you?

A. No, no direct knowledge. I have heard that one piano sold there for a thousand dollars. I think it was the first one that came in, but I do not know what the price was.

Q. But what that piano would be worth on the market there at Nome was largely a matter of guess if you had it there and wanted to sell it, would it not be?

A. I think it would have been in demand—great demand for it. There was so many dancehalls and places opening up, pianos were scarce.

(Testimony of witness closed.)

And thereupon an adjournment was taken to some date to be hereafter agreed upon by proctors for the respective parties.

July 18th, 1904, 2:00 P. M.

Hearing resumed pursuant to adjournment.

T. J. CONSIDINE, a witness produced on behalf of the libelant, being first duly sworn, testified as follows:

Q. (By Mr. BRINKER.) Mr. Considine, where do you live?

(Testimony of T. J. Considine.)

A. 609 Boren Avenue, Seattle, State of Washington.

Q. Were you living in Seattle in 1900?

A. Yes, sir.

Q. Are you a member of the Standard Theater Company? A. Yes, sir.

Q. Do you hold any office in that company?

A. I am a member of the Board of Trustees.

Q. Do you remember of the Standard Theater Company shipping a cargo of merchandise to Nome in May, 1900? A. Yes, sir.

Q. What vessel was that cargo shipped on?

A. On the "Santa Ana."

Q. Did you go on that vessel to Nome?

A. Yes, sir.

Q. With that cargo? A. Yes, sir.

Q. When did she sail from here, do you remember?

A. The 26th of May, if my memory serves me right.

Q. If anything occurred on the voyage out of the ordinary, please state what it was?

A. We had a fire.

Q. When did that fire occur?

A. Well, now, I wouldn't be positive about that: we were four or five days out.

Q. Do you remember how far out from Cape Flattery?

(Testimony of T. J. Considine.)

A. They said we were 700 miles away—something like that.

Q. Do you remember the fire breaking out about the 1st or second of June?

A. Along about there, I think it was.

Q. How long did the fire burn?

A. Well, if my memory serves me right, I think it burned close to forty hours—that is, they had the hatches battened down forty hours. There was a pile of steam in the hold where the cargo was.

Q. Where was the fire?

A. The fire was down in the hold of the vessel where the cargo was—where all the goods were stored.

Q. What effort was made to put the fire out?

A. Well, they just battened down the hatches close.

Q. Under whose direction were the efforts to put the fire out had?

A. Well, they were under the direction of the captain and his crew.

Q. You say the fire lasted forty hours?

A. Yes, sir; that is my recollection of it—it might be not quite that long.

Q. When the fire was finally extinguished, were the hatches lifted? A. Yes, sir.

Q. What was the condition of the cargo, if you saw it, after the fire was put out?

(Testimony of T. J. Considine.)

A. Well, the portion of the cargo that they brought up after they had the fire extinguished, I saw. It was in very bad condition. Everything was falling to pieces. They were falling to pieces there from the steam and heat. Some of them were scorched and burned from the steam and heat. Things were falling apart.

Q. The vessel proceeded on its voyage?

A. Yes, sir—never stopped.

Q. What time did you arrive at Nome?

A. I couldn't tell the exact date. I know we arrived in the morning, and they told us to go back to Egg Island—we had smallpox aboard. Kept us over there for ten days. Then we went back to Nome after that.

Q. You were quarantined?

A. We were quarantined, yes, sir.

Q. After she got to Nome, was the cargo discharged?

A. The cargo was brought ashore; yes, sir.

Q. You saw the cargo after it was brought ashore?

A. I saw portions of it, yes, sir.

Q. What condition was it in?

A. Well, it looked to me like it was a total loss, the biggest part of it, what I see of it.

Q. From what did the damage appear to have been caused?

(Testimony of T. J. Considine.)

A. Well, some of it was from smoke, a little fire and the most of it seemed to me to be from steam and heat. All glued furniture, like tables like this, would pull apart.

Q. Did you examine the cargo of the Standard Theater Company?

A. Yes, sir; I saw any portions of it that were brought ashore.

Q. Did you make any particular examination of it?

A. Yes, sir. I stood down in town where they put it ashore and I saw the fixtures and one thing or another, and they were all—well, I wouldn't give very much for them—they were not worth much. The looking glasses and mirrors were damaged and spoiled.

Q. How was the furniture?

A. The furniture was all kind of—you know—the glue falls apart, the steam and heat was so bad.

Q. Take these mattresses, what condition were they in?

A. They were in very bad condition; steam run all through them. They were not worth forty cents.

Q. Did you notice any of the bottled goods?

A. Yes, sir, the bottled goods—the corks were all drawn out of them from the steam, making them absolutely useless.

(Testimony of T. J. Considine.)

Q. Could you tell to what extent the cargo of the Standard Theater Company was damaged?

A. What it was valued at?

Q. Yes, sir; to what extent in dollars.

A. How much it was worth in dollars?

Q. How much it was damaged?

A. No; I could not. It looked to me like it was pretty nearly a total loss, though.

Q. How long did you remain in Nome after the cargo was taken ashore?

A. I was there seven or eight days after the cargo was put ashore—not very long; I couldn't tell the number of days.

Q. Then you returned to Seattle?

A. Then I returned to Seattle; yes, sir.

Q. Who was left in charge of the cargo when you left there? A. Mr. William Malloy.

Q. That is all.

Mr. POWELL.—That is all.

(Testimony of witness closed.)

FRANK G. PETERSON, a witness produced on behalf of the libelant, being first duly sworn, testified as follows:

Q. (By Mr. BRINKER.) State your name.

A. Frank G. Peterson.

Q. Where do you live?

(Testimony of Frank G. Peterson.)

A. 516 20th Avenue, Seattle.

Q. Where did you live in 1900?

A. I lived on Jackson Street—I have forgotten now the number of the house.

Q. You lived in Seattle? A. Yes, sir.

Q. Did you know of the existence of the Standard Theater Company? A. Yes, sir.

Q. Were you ever employed by that company?

A. Yes, sir—certainly.

Q. Do you know of the Standard Theater Company shipping a cargo of merchandise to Nome in May, 1900? A. Yes, sir.

Q. On what vessel was it shipped?

A. On the "Santa Ana."

Q. Did you go to Nome on that voyage?

A. I did; yes, sir.

Q. Did anything occur on the voyage out of the usual after passing Cape Flattery on the way to Nome? A. Yes, sir; she caught fire.

Q. The vessel was afire? A. Yes, sir.

Q. Where was the fire?

A. It was right in the forward hold.

Q. In the forward hold?

A. Where all the cargo was.

Q. Among the cargo? A. Yes, sir.

Q. How long did the fire burn?

(Testimony of Frank G. Peterson.)

A. Well, that I couldn't say exactly, because my recollection is it was the 2d day of June that they found it, and that they didn't get it out first—well, they had steam on it; then they opened up the hatches and thought it was out, but found it was still burning, and battended the hatches down again, and about the 4th, I think, the fire was extinguished.

Q. About the 4th?

A. Yes, sir, about the 4th of June, I think it was.

Q. And were you present on deck when the hatches were opened after the fire was extinguished?

A. Yes, sir; I was right there.

Q. Under whose direction was the fire extinguished? A. Under the captain's direction.

Q. Captain of the vessel? A. Yes, sir.

Q. After the fire was extinguished and the hatches opened up, did you see any part of the cargo?

A. Yes, sir; I saw lots of boxes of champagne was taken up—all went to pieces and were thrown overboard.

Q. How much of that was there that was thrown overboard?

A. Oh, I couldn't say; there was, along the rail—as long as this room around there. It was piled right up to the rail on the deck—lots of stuff.

Q. You went on the vessel to Nome, didn't you?

(Testimony of Frank G. Peterson.)

A. Yes, sir.

Q. Do you remember when you reached Nome?

A. I don't know—I don't remember that exactly, because we were quarantined, you know—they were quarantined to Egg Island ten days, so I couldn't say when we did get in there. I think it was— I know I was at Nome on the 4th of July—I know that, but I forget what time it was.

Q. You got there about the 3d?

A. I think it was the latter part of June, we got in there; I couldn't say that for sure.

Q. Was the cargo unloaded after they got to Nome? A. Yes, sir.

Q. What was done with it?

A. It was stored in a big shed there along the shore.

Q. Did you see the cargo that belonged to the Standard Theater Company after it went ashore?

A. Yes, sir; I did.

Q. Where was it put—where was that cargo put?

A. Well, it was—in the first place, it was put in a big shed, right down by the water's edge.

Q. On the beach? A. Yes, sir.

Q. And then where was it put?

A. Then it was taken up and put in a great big tent that belonged to the company.

(Testimony of Frank G. Peterson.)

Q. That belonged to the Standard Theater Company? A. Yes, sir.

Q. Now, after the cargo was put in that tent of the Standard Theater Company—what street was that on of Nome, do you remember?

A. Well, that was on Second Avenue, I think—well, I couldn't tell where it was.

Q. Well, it was right back of the Hunters' saloon? A. Right back of the Hunters.

Q. Now, after the cargo was put in that tent, did you examine it?

A. Well, yes; we went over it.

Q. Who was with you when you examined it?

A. Mr. Will Malloy there.

Q. Will Malloy?

A. Yes, sir. Of course, at the time of the examination Gollin was around there, and helped to handle some of the goods.

Q. Who else?

A. Well, there was Mr. Malloy, and I am not sure whether Harry Gordon was there or not—couldn't say for sure.

Q. You couldn't say for sure whether he was there or not?

A. No, sir; I couldn't say.

Q. How many examinations did you make of that cargo there in that tent?

(Testimony of Frank G. Peterson.)

A. Well, after the adjuster was there—

Q. Adjuster Gollin?

A. Yes, sir, Mr. Malloy and I we went clear through the whole thing.

Q. What kind of an examination did Gollin make?

A. He opened up a few of the boxes and looked at it, and it looked good, to look at, but after you got it opened right, why, it looked different.

Q. Well, what I mean is did he make a very careful and thorough examination, or did he make just a cursory examination?

A. I would call it an awful poor examination.

Q. Afterwards, I understand you, you and Mr. Malloy made a careful examination of the whole cargo?

A. Yes, sir; we went through the whole thing.

Q. Do you know what the purpose of the examination was that was made by Mr. Gollin?

A. Well, I should think it was in case of the insurance.

Q. And what was the purpose of the examination that was made by you and Mr. Malloy?

A. Well, also in case of getting insurance out of it. I did not ask any questions about it; I was just to go in with him and look through it.

(Testimony of Frank G. Peterson.)

Q. I will call your attention to certain items of the cargo, and ask you to state what the condition of those items was, if you know? There are 4 barrels of Guinness' White Label Ale?

A. Well, there is going to be simply a hard proposition—this is a long time ago.

Q. State, as near as you can remember, the condition of that ale?

A. That ale, I guess, was 25%.

Q. Damaged 25%?

A. Yes, sir. I couldn't give that correct, of course.

Q. Then there were two barrels of porter?

A. Thirty-five pre cent.

Q. About 35% damage? A. Yes, sir.

Q. There was one 5-gallon keg of Jamaica ginger?

A. Oh, I guess that was about a loss—no; 65 on that. I can't remember.

Q. Well, as near as you can remember. One 5-gallon keg of peppermint? A. Well, 35%.

Q. Thirty-five per cent damage?

A. Yes, sir.

Q. Then, there was one ten-gallon keg of absinthe? A. Well, that 100%.

Q. And there was one ten-gallon keg of benedictine? A. That was 100%.

(Testimony of Frank G. Peterson.)

Q. One ten-gallon keg of vermouth?

A. Fifty per cent, I think.

Q. Then, there was one ten-gallon of Creme de Menthe; how much was that damaged by the steam and heat, if you recollect?

A. Well, I think that was about 50%.

Q. Then, there was one 5-gallon keg of Angostura; how much was that damaged?

A. Seventy-five per cent.

Q. Then, there was one five-gallon keg of Boonchamp Bitters; how much was that damaged?

A. Thirty-five per cent.

Q. Then there was one five-gallon keg of H. H. Bitters; how much was that damaged?

A. I don't think I remember that.

Q. You don't think you remember, you say?

A. No.

Q. Then there were ten barrels of Old Pepper Whiskey; were they damaged in any way?

A. About 50%, I think.

Q. There was one barrel of imported gin; how much was that damaged?

A. Thirty-five per cent.

Q. There was a barrel of Jamaica rum; how much was that damaged?

A. I don't remember that at all—I don't remember a thing about it.

(Testimony of Frank G. Peterson.)

Q. There was one case of Cognac brandy; do you remember how much that was damaged, if any?

A. Thirty-five per cent.

Q. Four barrels of Scotch whisky; how much was that damaged?

A. That was damaged 100%.

Q. There was one barrel of blackberry brandy; how much was that damaged?

A. Thirty-five per cent.

Q. One barrel of rock candy syrup; how much was that damaged?

A. Thirty-five per cent.

Q. And one cask of De Compey Gin; how much was that damaged? A. About 25%.

Q. Then there was a lot of furniture and bedding; —chairs, furnishings, washstands, dressers, etc.?

A. Well, that was damaged 90%.

Q. That was damaged 90%? A. Yes.

Q. There was one cash register; how much was that damaged? A. Fifty per cent, I think.

Q. There were eight cases of Rochester lamps; how much were they damaged; do you remember?

A. Thirty-five per cent, I think.

Q. And there were eight cases and ten barrels of glassware and furnishings; how much were they damaged? A. Seventy-five per cent.

Q. There were twenty-two packages of groceries?

(Testimony of Frank G. Peterson.)

A. That was all ruined—100%.

Q. Was that a total loss? A. Yes, sir.

Q. There was one combination stove; how much was that damaged?

A. Twenty-five per cent, I think.

Q. Then there were two chuck-a-luck tubs?

A. They were ruined.

Q. What is the extent of the damage of that?

A. That was 100%.

Q. There was a suit wheel; how much was that damaged? A. Seventy-five per cent.

Q. A roll-top desk; how much was that damaged?

A. It was damaged about 90%.

Q. There were two gold scales with their furnishings; how much were they damaged?

A. Thirty-five per cent.

Q. Now, there were two shipments of champagne; one lot seventy-five cases and one of twenty-five cases, in bottles, and the bottles in cases; how much were they damaged?

A. I think they were damaged 100%

Q. What was the condition of the champagne in those cases when you opened up the cases? Did you open up the cases and examine those cases of champagne? A. Yes, sir.

Q. In what condition did you find them?

(Testimony of Frank G. Peterson.)

A. Some of them was broke, some the bottom snapped off and some the whole end; others, of course, most of them, were not harmed at all, except most of the liquor was right out of them—clear out of them. Some had a little bit in the bottom, some would be half full, but in most cases they were pretty near empty. You could see right in the capsule where it came out through the cork under the capsule.

Q. Now, when the cases of that champagne were opened up in the first place, how did they appear to be?

A. They appeared to be all right until you got the bottles ready for to draw it; they showed then that they were all—mostly all ruined.

Q. Now, there was another shipment of twenty-five cases of champagne; how much was that damaged? A. Seventy-five per cent.

Q. Did that appear to be damaged in the same way as the other cases you have spoken about?

A. There was some whole bottles in them—there was more whole bottles—that seemed to be all right.

Q. Now, there was one lot of stationery purchased from the Lowman & Hanford Company, such as writing paper, envelopes, pencils and pen holders, blotters, books, indexes, etc.; what was the condition of those? A. That was a total loss.

(Testimony of Frank G. Peterson.)

Q. A total loss. Then there were a lot of stage settings; what condition were they in?

A. Well, those stage settings; they were damaged.

Q. Damaged to what extent?

A. Well, I think about 80%.

Q. Now, there were a hundred barrels of beer—beer in bottles; were those damaged? Was that beer damaged in any way?

A. Well, they was damaged; yes, sir—we found they were.

Q. To what extent? A. About 20%.

Q. Then there was a lot of hardware of various kinds, purchased from the Schwabacher Hardware Company and from John Schram and others; was that damaged in any way, and if so, to what extent?

A. Well, I remember the nails were damaged so that they could not be used at all, but the hardware, some of it, could be used.

Q. How much of it was damaged so that it could not be used?

A. Oh, I guess 50%—I don't know exactly; somewhere there.

Q. Then there were 60,000 cigars; do you remember what condition they were in?

A. They were damaged 75%.

(Testimony of Frank G. Peterson.)

Q. Now, there were a lot of checks—gambling checks—composed of celluloid, or some sort of composition; what condition were they in?

A. They were damaged 75%.

Q. They were damaged 75%? A. Yes, sir.

Q. Now, there were a lot of gambling tables; what condition were they in?

A. Well, they were damaged 50%.

Q. Damaged 50%. A. Yes, sir.

Q. Now, you fixed those tables up; didn't you, in some way? A. Yes, sir; I did.

Q. There were twelve barrels of Imported Ginger Ale in the bottles in the barrels; can you state how much they were damaged—that is, if any?

A. I don't remember—I don't remember that.

Q. There were twenty-eight cases of bar fixtures, consisting of Brunswick-Balke Bar Fixtures, for a bar 30 feet long; now what was the condition of those? A. The bar, it was a total loss.

Q. A total loss? A. Yes, sir.

Q. Now, there was a piano; did you examine that? A. Yes, sir.

Q. To what extent was it injured, if at all?

A. One hundred per cent.

Q. There were three rolls of scenery—painted scenery—painted upon canvas?

(Testimony of Frank G. Peterson.)

A. It was not possible to get them apart; they were spoiled altogether.

Q. Spoiled altogether? You say they were damaged 10%? A. Yes, sir.

Q. There were two packages of stage wardrobes, consisting of fine, flimsy stuff, ornamented with bright tinsel ribbons, etc?

A. That was ruined—100%.

Q. That was damaged 100%? A. Yes, sir.

Q. There were ten cases of claret; to what extent was that damaged? A. I cannot think at all.

Q. You don't remember? A. No.

Q. There were two cases of gin in bottles, boxed—in boxes?

A. That gin was all a loss—100%.

Q. That was damaged 100%? There were two cases of Hostetter's Bitters, in bottles, and then cased up, in wooden boxes? A. That was 80%.

Q. That were damaged 80%? A. Yes, sir.

Q. There was one case of Imported Sherry?

A. That was damaged 100%.

Q. That was damaged 100%—that was ruined?

A. Yes, sir.

Q. There were five cases of Gold Medal Liquor—cordials, I suppose they are—used on the bar; to what extent was that damaged?

A. That was 100%.

(Testimony of Frank G. Peterson.)

Q. That was ruined; was it? A. Yes, sir.

Q. There was one case of Rock & Rye?

A. That was all lost—100%.

Q. There were two cases of Boonekamp's Bitters in bottles; do you remember how much they were injured? A. I think about 75%.

Q. There were two cases of Angostura Bitters?

A. Damaged 100%.

Q. They were damaged 100%. A. Yes, sir.

Q. One case of Imported Port Wine in bottles?

A. I think that was 80%.

Q. There was one case of Pousse Cafe?

A. Well, I don't remember that at all.

Q. Ten cases of Wild Cherry in bottles?

A. They were 100%.

Q. There were four cases of Italian Vermouth?

A. That I don't remember either.

Q. Four cases of French Vermouth?

A. I don't remember that at all.

Q. And there was one case of Irish Whisky?

A. Damaged 100%.

Q. There were four cases of Scotch Whisky in bottles? A. That was also damaged 100%.

Q. There were two cases of W. C. Bitters in bottles; do you remember about those?

A. No; I don't know anything about them.

Q. You don't remember about them?

(Testimony of Frank G. Peterson.)

A. No, sir.

Q. There was one case of Three Star Hennessey Brandy; do you remember about that; to what extent that was damaged—that was brandy in bottles?

A. No; I can't think at all.

Q. There were two boxes of lay-outs for various gambling devices painted on oilcloth?

A. Those were damaged 75%.

Q. There was one Bookmaker's wheel; to what extent was that damaged?

A. That was damaged 100%. It could not be used.

Q. It could not be used at all? A. No, sir.

Q. There was one roulette wheel; that was damaged how much? A. That was damaged 100%.

Q. There were nineteen check trays for holding gambling checks, I believe—chips?

A. They were damaged 100%.

Q. One hundred per cent. There was 320 dozen packages of bicycle playing-cards?

A. They were no use; they were all spoiled.

Q. All destroyed? A. Yes, sir.

Q. Damaged 100%?

A. One hundred per cent.

Q. There were 35 dozen packages of Faro cards; to what extent were they damaged?

A. They were also damaged 100%.

(Testimony of Frank G. Peterson.)

Q. There were five cases of Wild Cherry Cordial in bottles; to what extent were they damaged, if any—do you remember about those?

A. I can't say; I don't remember.

Q. There were two iron skeleton safes, do you remember those? A. Yes, sir.

Q. Were they damaged in any way?

A. They were damaged 25%; paint was all cracked off of them.

Q. There were Hazzard cups, do you remember to what extent they were damaged, if any?

A. I think they were damaged 75%.

Q. And three sets of spotted Hazzard dice; three sets Birdseye Hazzard dice; four blank dice, and three sets of dice, and 175 markers?

A. Those markers—we have got some of the markers.

Q. How about the other things?

A. All the dice was all ruined.

Q. The dice were all ruined?

A. Yes, sir; they were all ruined by the steam.

Q. A total loss? A. Yes, sir.

Q. Now, to what extent were the markers damaged? A. I think about 75%.

Q. Some of the markers were good?

A. Yes, sir; we could pick them over and use some of them again.

(Testimony of Frank G. Peterson.)

Q. There was one Will & Fink round card-cutter; to what extent was that damaged?

A. That was entirely ruined.

Q. That was entirely ruined? A. Yes, sir.

Q. Then, there was one Will & Fink trim shears?

A. They were also spoiled.

Q. They were ruined?

A. Yes, sir; 100%.

Q. One parker Hammerless shotgun; to what extent was that damaged?

A. That was 100 %

Q. There was one 36 calibre Marlin rifle; what was its condition? A. That was also 100%.

Q. There was one 22 calibre Marlin rifle?

A. That was 100%.

Q. Two 41 calibre Colt's revolvers?

A. Those were damaged 75%.

Q. There was one pair of large bench shears?

A. Those I never did remember any thing about.

Q. You don't remember anything about those?

A. No, sir.

Q. There were threefold up Faro lay-outs?

A. Yes, sir; they were ruined entirely—100%.

Q. There were three Will & Fink case keepers; were they injured in any way?

A. Yes, they were injured.

Q. To what extent?

(Testimony of Frank G. Peterson.)

A. I think it was 60%.

Q. And there were three Will & Fink No. 1171 faro boxes?

A. They were damaged 50%, I think.

Q. There were three Will & Fink broadcloth faro cloths?

A. Yes; they were also ruined; those were 100%.

Q. There were 1500 Star Faro chips?

A. I don't remember those at all.

Q. You don't remember them?

A. No.

Q. There were 150 Fleur de Lis Faro checks?

A. I don't remember those.

Q. Do you remember about those? A. No.

Q. There were 1500 Roman Faro checks; do you remember about those? A. No, sir.

Q. Four card cases?

A. Those card cases—they were damaged 50%. I couldn't say for sure whether that is right or not.

Q. There was one Cosmic Bamboo Fishing rod?

A. That was 50%.

Q. There were six new Klondike dice boxes—Klondike or dice boxes?

A. Those Klondike dice boxes they were all ruined.

Q. They were all ruined?

A. Yes, sir; 100%—all leather, you know.

(Testimony of Frank G. Peterson.)

Q. There were four dozen book making balls.

A. They were also made of celluloid, and were ruined.

Q. Two sets of horse dice; what was their condition? A. Well, they were 100%.

Q. There was one set of Fighter's dice?

A. One hundred per cent.

Q. There were six sets of chuck-a-luck dice?

A. Those were also 100%.

Q. There were twelve sets of crap dice?

A. Also 100%.

Q. And 24 sets of Klondike dice—Magenta.

A. Also 100%.

Q. And there was one 40 drop enunciator, complete; did you examine that?

A. Yes, sir; I examined that, I done a whole lot of work on it. I have forgotten now.

Q. To what extent was that damaged?

A. I think 35%.

Q. Now, there were 20 barrels of Lacey whisky; was that damaged in any way?

A. Yes, sir; 25%.

Q. Damaged 25%? There were five barrels of Old Crow Whisky? How much was that damaged?

A. Fifty-five per cent.

Q. There were three barrels of Guggenheimer whisky? A. Well, 35%.

(Testimony of Frank G. Peterson.)

Q. Now, there was a box of Transom lights; do you remember whether they were damaged in any way?

A. No—some of the glass was broke.

Q. Some of the glass was broken? Do you know how much the damage was?

A. Exactly, I couldn't say; but I think I put it at 60%.

Q. Sixty per cent on those Transom lights?

A. Yes, sir.

Q. Now, there were 14 bundles of doors; were they damaged or injured in any way?

A. Yes; 75%—all came apart.

Q. Came apart? Panels swell?

A. Yes, sir.

Q. There was a box of glass, consisting of glass lay-outs, bookmarkers, wheels, etc.

A. Well, they were all ruined—that is, 100%.

Q. Then, there was a box of lithographs?

A. Well, that was 100%.

Q. There were two packages of "Stage Prop." what were they?

A. Stage properties — they were the scenery frames, you know.

Q. Were they injured in any way by the steam and heat, that you remember? A. I think 50%.

(Testimony of Frank G. Peterson.)

Q. There were two cases of toilet paper; do you remember that?

A. Well, that was damaged 20%.

Q. About 20%? In your opinion?

A. Yes, sir.

Q. Then, there was another box of hardware?

A. Well, I don't remember that.

Q. You don't remember about that?

A. No, sir.

Q. There were four joints of sewer pipe?

A. Well, they were all broke.

Q. All broken? A. Yes, sir.

Q. Then, there were five double T's and one single T of the same kind of pipe?

A. Yes, sir. They were all spoiled, that is 100%.

Q. Two bundles of canvas. Do you remember the canvas?

A. Well, it was 50%, I think it was.

Q. It was damaged 50%? A. Yes, sir.

Q. There were three cases of tinware? Do you remember the tinware, kitchen furniture, etc?

A. I think that was damaged 35%, I think.

Q. Then, there was one package of mirrors; do you remember that package of mirrors?

A. Seventy-five per cent.

Q. Damaged? A. Yes, sir.

(Testimony of Frank G. Peterson.)

Q. There was one bale of carpet, was that injured in any way? A. Seventy-five per cent.

Q. And there was one crate of mirrors?

A. Well, they were all broken.

Q. They were all broken?

A. Yes, sir; 100%.

Q. Was a box of tinware, do you remember about that? A. I don't remember.

Q. Then, there was a second bale of carpet—two packages of the carpet there?

A. It was damaged 75%.

Q. There were two bales of splashers; do you re- as I understand it, is paper that goes underneath the carpet?

A. Yes, sir. That was all spoiled—100%.

Q. There were two bales of splashere; do you remember those?

A. No; I don't remember those at all.

Q. And one bale of splashers?

A. I don't know anything about them.

Q. There was one case of oilcloth; do you remember that?

A. Well, that was damaged 90%, I think.

Q. Then, in addition to the other sewer pipe, there is a package of three chimney tops?

A. Yes, sir.

Q. They were in the same condition as the others? A. They were ruined, 100%.

(Testimony of Frank G. Peterson.)

Q. There were 114 bundles of corrugated iron?

A. Yes, sir. That was damaged 25%.

Q. Now, there were three cases of cigars in one bill and ten cases in another. How much, if any, were they damaged, do you know?

A. Seventy-five per cent.

Q. There were ten barrels of jugs—empty jugs, I suppose? A. They were not injured at all.

Q. They were all right? There were twelve cases of glass whisky flasks?

A. Well, those whisky flasks—they were all broke to pieces; that was 100%.

Q. There were two cases of Angostura Bitters; do you remember them?

A. I don't remember, no.

Q. Two cases of Horsford's Bitters?

A. I don't remember that.

Q. Then, there was a case of corks and labels, faucets, funnels, filter attachments, wine spiggots, rubber hose hydrometer. How much were they damaged? A. Thirty-five per cent.

Q. You stated, I think, that the whisky in barrels was injured. How did that injury or damage appear?

A. Well, it appears as coming through the bung —leaked out of the barrel.

(Testimony of Frank G. Peterson.)

Q. There was a case of glass signs, do you remember that case? A. The cigar signs.

Q. Yes.

A. The cigar signs—I think they were all ruined; I think they were all spoiled.

Q. They were all spoiled—damaged 100%?

A. Yes, sir.

Q. Now, there were three cases of seltzer bottles and three cases of seltzer generating machines?

A. Yes, sir; they was 100%.

Q. And one case of powder? Three gross of selzer powders for making seltzer waters?

A. One hundred per cent.

Q. That was all ruined, was it?

A. Yes, sir.

Q. There were two air-tight heater stoves; were they damaged in any way?

A. Yes; they were damaged; yes. They were all bunged up. I think I put them in at 35%. I don't remember much about them.

Q. About 35% damage? A. Yes, sir.

Q. And there were two large heaters?

A. About the same extent.

Q. About the same extent. There were six packages of paper. I don't know what that is, unless it was the carpet lining that you have referred to

(Testimony of Frank G. Peterson.)

above. I will ask you about the tar paper—building paper?

A. Well, that was ruined, because you couldn't get it apart, you know, at all.

Q. You couldn't get it apart? A. No, sir.

Q. That was all ruined? A. Yes, sir.

Q. Now, there was a package of choloride of lime, and other drugs, purchased from the Stewart & Holmes Company?

A. That was—the drugs were all spoiled. One hundred per cent, that is.

Q. There were six tents. Do you remember those tents?

A. Yes, sir; I do. I think they were damaged 50%, I think.

Q. There were fourteen rolls of T. & B. paper; what is that?

A. That is building paper. That is included.

Q. Is that different from the tar papers?

A. That has no tar on it.

Q. That has no tar on it?

A. No; it has no tar on it.

Q. What was the condition of that paper?

A. Well, I couldn't say exactly; I have forgotten about the condition it was in now.

Q. You don't remember about that?

A. No, sir.

(Testimony of Frank G. Peterson.)

Q. You don't remember about that?

A. No, sir.

Q. There was two crates of stovepipe?

A. I think I set them at 25%.

Q. 25%? A. Yes, sir.

Q. There was another box of tinware, or hardware and wire on spools, ten bales and one three-burner oil stove, half dozen galvanize tubs, screws and washers and sand paper, 25 lbs. white glue—all seem to have been in the same package—door handles, etc?

A. Yes, I think I put them at 25%.

Q. There were 22 kegs of nails?

A. Those I put at 100% because they couldn't be used at all.

Q. They couldn't be used at all?

A. No, sir.

Q. There were ten cases of mineral water. Do you remember that mineral water, what condition it was in? A. No; I don't remember.

Q. There is another tent—I suppose that was that large tent?

A. That was damaged 25% I think that was.

Q. There was three cases of merchandise, marked merchandise on the bill of lading—I don't know what the contents were; do you remember those in particular? A. I do not; no.

(Testimony of Frank G. Peterson.)

Q. There were six cases of oil?

A. That was crated.

Q. That was carried on deck, and was not injured at all?

A. That was carried on deck and wasn't injured.

Q. Then, there were 22 bundles of glazed sash—32 windows and transom sash; do you remember those?

A. I remember the sash, but I can't say exactly what the damage was to them.

Q. You don't remember the damage to them?

A. No, sir.

Q. There were three cases of fire extinguishers?

A. I think I put them at 25%.

Q. Now, there were a lot of crap-tables, table tops, table legs, roulette table tops, altogether making fourteen tables and material for another crap table, which was not set up at the time it was shipped, but was in the cargo.

Q. Now, if those tables were damaged in any way, state to what extent?

A. Fifty per cent, I think.

Q. Now, there were some enameled, aluminum and gold bronze and brushes?

A. They were all spoiled.

Q. All ruined? A. Yes, sir.

Q. Fifty gallons of Pratt's astral oil was carried on deck you say and that was not hurt?

A. No, sir; that was not hurt.

(Testimony of Frank G. Peterson.)

Q. Now, did you make an effort to put any of this stuff in repair—any of those goods, so that they could be sold? A. I fixed up the bar fixtures.

Q. You fixed up the bar fixtures?

A. Yes,—as it was.

Q. How much time did you put in on the bar fixtures?

A. I put in 11 days with two men besides myself.

Q. Eleven days? A. Yes, sir.

Q. What were you paid for that work?

A. Why, I got my $2 an hour and paid two fellows I had to help me $1.50 an hour.

Q. Were those the going wages at that time in Nome?

A. Those were the going wages at that time, I understood; yes.

Q. How much were you and the men you had employed paid for doing that work on the bar fixtures?

A. Well, I got—we were paid $550. Then, I furnished the material, I think $15—$565, is what it cost them.

Q. They paid you $565 for the material and work put on the bar fixtures? A. Yes, sir.

Q. So as to make them so that you could sell them? A. Yes, sir.

(Testimony of Frank G. Peterson.)

Q. Did you do any work on the roulette wheels?

A. I did $225 worth.

Q. Standard Theater Company paid you 225 for the work you did on the roulette wheels.

A. Yes, sir; $225.

Q. Did you do any work on the piano?

A. I worked eight days on the piano myself at $2 an hour.

Q. And how much did the Standard Theater Company pay you?

A. One hundred and sixty dollars.

Q. One hundred and sixty dollars? Did you do any work on the enunciator?

A. I worked on it 15 hours.

Q. At two dollars an hour? A. Yes, sir.

Q. They paid you $30 for that?

A. Yes, sir.

Q. Did you do any work on the roll top desk?

A. Yes, sir; I put twenty-five hours on it.

Q. At two dollars an hour? A. Yes, sir.

Q. They paid you $50 for that? A. Yes, sir.

Q. Now, what was the condition of that roll top desk? A. Well, it was all come apart.

Q. It was glued?

A. It loosened some of the rails—came off in the heat and steam. That loosened some of the rails. There was four rails on the front of it. It was all apart.

(Testimony of Frank G. Peterson.)

Q. Now, the damage that you have spoken of to these various items—what was it caused by—the items to which I have called you attention?

A. Well, most of it was caused by the steam and heat there, because the bar fixtures, they were all apart, you know; The Birdseye veneer that is formed on it, lots of that I had to take clear off, and take the panels out and scrape the panels and stain the panels—couldn't put the veneer back at all; and the columns—there was massive columns, you know—fine furniture and the veneer was all off, and I kept putting it back as well as I could, but still the waves on it—wavy—you couldn't get it—you couldn't do a good job—especially up there you couldn't do it; you couldn't hardly get anybody that understood that kind of work, anyhow.

Q. The mattresses—what condition were they in?

A. Well, a few mattresses there were in a bad condition.

Q. What seemed to be the biggest damage to the mattresses?

A. Well, they was all wet—seems to be—well, by the time we got them they were moldy.

Q. Wet from the steam?

A. Yes, sir. I think there was one or two that was burned a little.

Q. One or two burned a little? A. Yes, sir.

(Testimony of Frank G. Peterson.)

Q. Now, there were some of the articles in that cargo that were injured by fire, were there?

A. Oh, yes; the bar fixtures were injured a little by fire. Of course, the steam was the most injury to them.

Q. That is all at this time.

At this time further hearing was adjourned until 2:00 P. M.

2:00 P. M.

Hearing resumed pursuant to adjournment.

Cross-examination.

Q. (Mr. POWELL.) When did you first begin to work for the Standard Theater Company?

A. I think it was the 4th of March, I guess, something like that.

Q. In 1900?

A. Yes, sir—the time we started on these tables.

Q. What is your trade, or business?

A. My trade is wood carver and cabinet-maker.

Q. Were you engaged in making any of this stuff of the Standard Theater Company, that the Standard Theater Company sent to Nome on the "Santa Ana"?

A. Yes; I made all the gambling tables.

Q. Now, I understood you to say that you went on the "Santa Ana" yourself at the same time—on the same trip that the cargo went?

(Testimony of Frank G. Peterson.)

A. Yes, sir.

Q. Do you remember how many days you had been out from Seattle before the fire broke out?

A. I do not.

Q. Now, you spoke yesterday in your direct examination of the fact that the first attempt to put out the fire was not successful? A. Yes.

Q. After that time—this first attempt, they opened up the hatches again and found the fire was still burning? A. Yes, sir.

Q. Now, how long had the fire been burning up to that time?

A. Well, I don't know exactly—but I understood—my recollection is that the fire was discovered the 2d day of June and the 4th the fire was out.

Q. How long were they engaged in making this first attempt that you spoke of to put the fire out?

A. I can't say how many hours it took—I can't say.

Q. As long as a day?

A. Well, I guess it did, pretty near—seemed to me about that.

Q. Then, after you found out that the fire had not yet been extinguished, when they discovered that, on opening the hatches, they closed down the hatches again and made a second attempt to put it out? A. Yes, sir.

(Testimony of Frank G. Peterson.)

Q. Which was finally successful?

A. Yes, sir.

Q. Now, after the fire had been extinguished, and they had opened up the hatches, I understand you to say that they took out quite a number of boxes of champagne? A. Yes, sir.

Q. Have you any knowledge of how many of those cases of champagne there were that were taken out of the hold? A. I could not say.

Q. What was done with them?

A. Well, there was some of them was all broke to pieces; the boxes was coming apart and was thrown overboard, some of it; some of it was packed back again and put down in the hold.

Q. I presume by boxes of champagne you mean what is generally called cases?

A. Yes, sir, cases.

Q. Now, were any of these cases that were taken out of the hold burned?

A. Well, I remember there was a few of them burned because they were—that is, what they were taking out then was taken out right around where the fire was started.

Q. Do you know how many of them were burned and how many were not? A. I could not say.

Q. Now, after you reached Nome and the cargo

(Testimony of Frank G. Peterson.)

was unloaded, it was stored first in the warehouse of the transportation company, wasn't it?

A. Well, I suppose that is so. It was stored in a warehouse; I never did find out what warehouse it was, but it was stored at the time in the warehouse.

Q. That is where the cargo was when Mr. Gullin made his examination of it?

A. He made his examination of it at the tent.

Q. After it had been taken up to the Standard Theater Company's tent?

A. Yes, sir; he couldn't make nothing there, you know; that was a small room—piled clear up to the top.

Q. But after the cargo had been taken up to the warehouse, Mr. Gullin did make some kind of an examination? A. He did.

Q. Now, who helped to make that examination?

A. Why, Mr. Malloy was there, and I was there and helped a little sometimes, but I was around there all the time—and I don't know for sure—whether Harry Gordon was there to help us; I couldn't say that for sure.

Q. What was the purpose of that examination, do you know?

A. Well, I suppose the purpose was for insurance purposes, I suppose. There was never anything said

(Testimony of Frank G. Peterson.)

to me about what the purposes were or anything of the kind, but I supposed that was it.

Q. Mr. Gullin was a representative of the insurance companies up there?

A. I suppose so; I never spoke to the man.

Q. Now, you were asked yesterday about how much certain of those goods were damaged?

A. Yes, sir.

Q. How much did I understand you to say that the ale that was in barrels was damaged?

A. I think it was 20 per cent.

Q. Now, upon what do you base your judgment that the damage to that ale was 20 per cent?

A. Well, because there was some of those bottles broke—

Q. Well, how many of them were broken? Do you remember how many of them were broken?

A. Well, I couldn't now state, because that is so long ago. I can hardly state these things exactly as I could at the time when it was all clear to my mind.

Q. That is, you are making these statements on your recollection of the facts?

A. Well, I thought it was just about the one-fifth of that—one-fifth of that ale was busted up—broken up.

(Testimony of Frank G. Peterson.)

Q. How much did I understand you to say that you thought the ginger ale was damaged—Jamaica ginger?

A. Well, I think that was a loss—

Q. That was a total loss, you think?

A. Yes, sir; I think it was.

Q. How much do I understand you to say that the porter was damaged?

A. The porter? Eighty per cent.

Q. Now, there were some peppermint that was in barrels, I believe, 5 gallon kegs of peppermint; how much did I understand you to say that keg of peppermint was damaged?

A. Well, I don't know that I can recollect any more what the peppermint was—I don't exactly remember enumerating that, but I think that was a loss, too.

Q. You mean a total loss?

A. Yes, sir.

Q. Now, there was some Vermouth—a 10-gallon keg and some in cases. I simply want to ask you about the keg Vermouth; how much did you say that was damaged?

A. Well, I think that was 100 per cent, I say.

Q. About 100 per cent. Now, what had done the damage to this Vermouth; had the keg been scorched or burned, or what?

(Testimony of Frank G. Peterson.)

A. No; it seems that them barrels—the heat just —the heat seemed to have an influence on it so that it just run right out of them.

Q. Pulled it right out of the kegs?

A. Well, it appeared to be that way.

Q. Did you test any of the Vermouth that was left? A. No, sir.

Q. Did you test any of those liquors that were left?

A. Yes, sir; I did test the champagne.

Q. Did you test any of the rest of them?

A. No, sir.

Q. Well, now when you say, then, that they were damaged such and such a per cent, these various liquors, you mean by that, that there was that rate per cent of the liquors lost.

A. Well, I mean to say they were lost, yes.

Q. I see. There was some Creme De Menth; I believe that was in a keg, to—a 10-gallon keg of Creme De Menth. How much was that damaged?

A. I guess that was 100 per cent, too, if I remember.

Q. There was some Angostura Bitters; how much do you think that was damaged, that was in a keg, I think, wasn't it—a five-gallon keg of Angostura Bitters?

(Testimony of Frank G. Peterson.)

A. Well, I guess that was 100 per cent, too—I can't remember now, though.

Q. Now, this Boonchamp Bitters; there was a keg of Boonchamp Bitters; was that damaged the same way? Was that a total loss, too?

A. Yes, I guess it was the same amount.

Q. Now, there was some Old Pepper whisky—that is, that was in barrels; what happened to that; how much was that damaged?

A. I guess that was 35 per cent, wasn't it—35 per cent.

Q. Were these barrels scorched any, or had that simply leaked?

A. No; they was not scorched any. There was, I remember one barrel was scorched.

Q. What kind of whisky was that one, do you remember? A. Well, I couldn't say.

Q. There was some gin—barrel or keg of gin—imported gin—how much was that imported gin damaged in your judgment?

A. I guess that was 60 per cent.

Q. Then, there was a keg of Jamaica rum. How much was that damaged, as you remember?

A. Thirty-five per cent.

Q. And Cognac Brandy—that also was in a cask. Do you remember how much that was damaged?

(Testimony of Frank G. Peterson.)

A. I am not sure—about thirty-five per cent—I couldn't say.

Q. There was some Scotch whisky in barrels. How much was that damaged?

A. Scotch whisky—I don't remember that at all.

Q. Now, there was some blackberry brandy, also in a barrel—one barrel of blackberry brandy. Do you remember how much that was damaged?

A. No; I do not.

Q. And you remember about the rock candy syrup—I think there was one barrel of that rock candy syrup; do you remember about that?

A. It was a loss—that was 100 per cent.

Q. The De Compey gin—was that in a keg or cask?

A. That was in a cask, I guess. There are so many different gins, I can't tell.

Q. That was the De Comey gin?

A. All the liquors were more or less lost; I couldn't say how much.

Q. Well, how much do you think that De Compey gin was damaged; have you any recollection about it? Have you any knowledge about it?

A. Well, I couldn't exactly state—I couldn't state what.

Q. Now, what condition was the furniture gener-

(Testimony of Frank G. Peterson.)

ally in in this cargo when it was examined by you there in Nome?

A. Well, it was all—well, you mean the furniture that was taken out, not the gambling tables.

Q. I mean furniture.

A. Stands, chairs, and all that stuff?

Q. Yes, sir, furniture exclusive of the gambling paraphernalia?

A. Well, the steam and heat on it—it was packed around with paper and what should I call, it now—excelsior and there was paper, for instance, put on and then excelsior, about that thick (indicating), then the open crates—open crates on all the furniture and this paper and excelsior had been damp and wet and with the heat it stuck right to the varnish, and, of course, they have all come apart, but I fixed up some of them and I have to scrape the whole thing off.

Q. How much of it did you get repaired so that it was in a useable condition?

A. Well, I think it was—I repaired two-thirds of it—something of that kind. There was an awful lot of repair made.

Q. All the repair that you had to do was to glue it together again and repolish it; wasn't that it?

A. And scrape it. First the glue had to be taken out—take it apart clear and scrape it off and get

(Testimony of Frank G. Peterson.)

the old glue off and glue it up again—then, had to be glued up again together and scrape all the varnish off and restrain them and revarnish them.

Q. How much do you think that furniture was damaged?

A. Well, that was damaged—I put it at 50 per cent.

Q. Now, this cash register; I believe you said that was damaged some, too. How much do you think that was damaged?

A. Well, I think the cash register was damaged 50 per cent.

Q. What was the matter with the cash register?

A. Well, it was—you know where the little indicators—or where that tab is? Well, that was just like it will stand like that (indicating)—it was just squeezed right down, and all squeezed up in certain places, and you couldn't work it. I don't know if they ever did get it to work, because I never bothered with that.

Q. Was it injured by fire, or being jambed some way?

A. Well, I suppose it was jambed and water, too. It was all tarnished.

Q. What was the matter with these Rochester lamps; had they been injured by the fire?

(Testimony of Frank G. Peterson.)

A. No, sir. I think they were marred more than anything else—squeezed up.

Q. They could be used all right, couldn't they?

A. Well, yes—I know that here were some of the burners that could not be used.

Q. What was the trouble with them?

A. Well, mashed, yes—because necessarily, you know, no steam or heat could spoil them at all, really.

Q. They had been broken or mashed in handling them?

A. I suppose, in regard to those—there was lots of them run their things out on the deck at the time of the fire, and then they attempted to go down to get more stuff off and then settled down, perhaps—by that, perhaps, it had been injured.

Q. How much were those lamps damaged, altogether, do you think? A. I think 35%.

Q. This glassware that you spoke of that was bar glassware, wasn't it? A. Yes, sir.

Q. And was packed in barrels? A. Yes, sir.

Q. How was that packed; with excelsior, paper, or what?

A. Paper. They are generally packed with tissue paper, you know.

Q. How was that?

A. I think it was 35% damaged I put on that.

(Testimony of Frank G. Peterson.)

Q. Had those been broken with the heat or the fire, or had the barrels been broken? Could you tell what had injured the glassware?

A. Well, I couldn't hardly tell what?

Q. Well, you know how glass looks that has been broken by the heat, don't you?

A. Well, I do know, but I do not know—I don't think they was really broke by the heat, because the heat—they had to be right, close to the fire. They had been down where the cold water was turned in then it came hot and then cracked to pieces, or I don't know—there might be such a thing.

Q. The groceries that you spoke of were they in cases or glasses or tin cans or what?

A. All in cases and cans and all different kinds of stuff, you know.

Q. How much of that did they save?

A. Oh, they didn't save any—it was eggs; there were cases of eggs and they were cooked, you know, as hard as could be—all the canned goods was. Why a person wouldn't dare to use anything out of them.

Q. And now the stove—what kind of a stove was that; one of these sheet iron stoves?

A. No, it was a cast-iron top.

Q. What happened to that?

A. Well, it was all squeezed together. All that bottom was sheet iron—I suppose too, the top was—

(Testimony of Frank G. Peterson.)

all out of shape, you know—rusty and every other thing.

Q. Mashed out of shape?

A. Yes, sir, and rusty.

Q. Well, if there had been nothing the matter with it except the rust it could have been repolished, couldn't it? A. Well, it might.

Q. How much do you think that stove was damaged altogether? A. About 35% .

Q. Well, this chuck-a-luck—that is a gambling device of some kind, isn't it? A. Yes, sir.

Q. You made that yourself, didn't you?

A. No, sir, I didn't. That was bought from—I don't know exactly—I can't remember now where it was bought.

Q. What was the matter with it?

A. Well, that was—the glass on it was broke and all the figures of the face of it was all defaced and it couldn't be used. It was all ruined.

Q. What was the matter with it; had it been broken?

A. There is a glass, you know, on the face of it—there is a glass right on the face of it, and a little shaft goes right in the center and then goes down on a pivot, and that is all broken to pieces.

Q. Could you tell what had broken that glass?

(Testimony of Frank G. Peterson.)

A. No, sir, only that it would be simply that the wood underneath from the steam and the heat swelled and broke that glass—I have an idea that that would be the cause.

Q. This stud wheel you spoke of—was there any glass about that? A. Yes, sir.

Q. What was done to the stud wheel?

A. That was also broke.

Q. How much was that damaged altogether?

A. Sixty per cent, I think that was.

Q. Did you repair that chuck-a-luck at all?

A. No; I couldn't do nothing with it. I don't remember anything about it.

Q. This roll-top desk, what had happened to that?

A. Well, that was all to pieces.

Q. Had it been broken? Did it just come apart from the heat and steam?

A. Well, it just came apart from the heat and steam.

Q. How much do you think that was damaged?

A. Say 90%.

Q. Did you repair that? A. I did.

Q. What did you have to do to it to repair it?

A. Took it all to pieces and fixed it up again the same as the rest of the furniture, and some little hoods along on the roller was loose, and I had to go to work and clean off that old canvas, because the heat had

(Testimony of Frank G. Peterson.)

curled that together so that I couldn't use it, and put new canvas on.

Q. These gold scales you spoke of; were they injured any?

A. Yes, sir, all the woodwork was injured.

Q. What had happened to the woodwork; had it been scorched or what?

A. No; that was cased nicely—cased up, in a heavy case, but the steam got in there and it was all to pieces.

Q. How much was it damaged, do you think, all told?

A. Well, I don't remember any more now; I suppose—I think it was 35%—something like that.

Q. Now, the champagne—all the champagne was in cases, wasn't it? A. Yes, sir.

Q. You were asked about two assortments of champagne—one 75 cases, and the other 25; I will ask you first about that champagne of 75 cases—that was in cases, was it not? A. Yes, sir.

Q. The bottles are covered with straw?

A. Yes, sir.

Q. A straw jacket? A. Yes, sir.

Q. How much was that champagne damaged?

A. That was damaged—the 75 cases—I call that a total, loss—those.

Q. You think there was no champagne out of that bunch that was saved?

(Testimony of Frank G. Peterson.)

A. No, there was some there, but they were all drained more or less out of it, so that the rest wouldn't be any good to us.

Q. Some of this champagne, I understood you to say a moment ago, had been thrown overboard; was that out of this champagne in the 75 cases?

A. That I cannot say; I cannot say.

Q. That smaller shipment of 25 cases—what was the condition of that?

A. Well, they were in a little better condition. I estimated that at 75% damage. There was a few there.

Q. Had any of those cases come in contact with the fire? Been scorched any?

A. There was a few cases had been close to the fire—some of them—a few cases, I think; I couldn't say exactly now. There was a few of them that was scorched a little in the first lot.

Q. A few of them indicated that the cases had been charred by the flames?

A. There were a few.

Q. I understood you to say that the stationery was a total loss? A. Yes, sir; it was.

Q. These stage settings that you spoke of, will you please tell us just what those are?

A. Those are—they were made with frames about 3 inches wide.

(Testimony of Frank G. Peterson.)

Q. Wooden frames?

A. Yes, sir—and cut up thoroughly to fit these scenery, and when we got there we just had to screw them up and put the sceneries onto them. That is what we call the stage settings.

Q. They were frames on which the stage scenery is fastened? A. Yes, sir.

Q. They were of wood?

A. Yes, sir; they were fir.

Q. They were fir? A. Yes, sir.

Q. What had happened to them?

A. It seems as though them frames was—they had machinery down there—whatever it was—heavy machinery and I suppose that the way they came to be—they stood about like that—just about like that (indicating)—just like they had been right in a regular press. Cracked all of them; they couldn't be used at all.

Q. How much do you think they had been damaged?

A. Well, it damaged them less than 100%, I know, but I forget now exactly, because we could use some of the sticks for something.

Q. Now, there were 100 barrels of beer—this beer, though was bottled beer, wasn't it?

A. Yes, sir.

Q. Did you examine all these barrels of beer?

(Testimony of Frank G. Peterson.)

A. Well, I examined most of them; yes, sir.

Q. How many barrels of them did you examine?

A. Well, I couldn't say for sure.

Q. When you examined a barrel of beer, how did you do it; did you take out all the bottles and examine them?

A. Well, I helped take out mostly all of them.

Q. How many bottles would there be in a barrel?

A. Well, that I don't know—that I can't remember now any more—whether six dozen or what there was—I can't remember.

Q. Had any of those barrels of beer been on fire?

A. Well, I think there was one barrel that was scorched, but that hadn't been really on fire, but there was one I know that was scorched.

Q. How much was this beer damaged, do you think?

A. I think I put it at 20% or 25%.

Q. Do you say you "think" you put it at that; what do you mean by that?

A. Well, I can't—that is so long since, you know, I can't remember. I can't remember these things sure, you know.

Q. That is your estimate that you put on?

A. Yes, sir. I couldn't be sure of these things now, that is so long.

Q. The hardware that was in the cargo—I presume that was wet, some, wasn't it?

(Testimony of Frank G. Peterson.)

A. Sure—rusty.

Q. Was it rusted any? A. Yes, sir.

Q. Was any of it broken?

A. No, there was nothing broken; it was all rusted up. We had to take it all apart—scrape them and fix them. Of course, there was some of the springs that were injured.

Q. How much do you think that was all damaged?

A. Fifty per cent.

Q. Did you examine that hardware yourself?

A. Why, yes; I did.

Q. There were 60,000 cigars that you were asked about yesterday; do you know what kind of cigars those were?

A. I don't remember now what grade it was.

Q. Did you examine those cigars?

A. I did, yes, sir. I smoked quite a few of them myself, too.

Q. Are you a judge of the mercantile quality of cigars? A. Yes.

Q. Have you ever dealt in them at all?

A. No.

Q. How much do you think that shipment of cigars was damaged? A. I put that 75%.

Q. Yes—well, why do you put it at 75%.

A. Well, it seems as though the cigars wasn't really worth anything. When they got ashore they

(Testimony of Frank G. Peterson.)

just busted right open—swelled up and busted open. They were damped, you know.

Q. All of them were all wet?

A. Well, mostly all of them, yes, sir—mostly.

Q. Well these gambling checks, what were they?

A. Well, they were a lot—I forget now how many—celluloid, or composition, but them I put at 75% loss. I picked out some of them and could use them. It wasn't genuine celluloid, because if they had been they would have been in the same condition as the dice, and they were all spoiled.

Q. When was it you first put the estimate of 75% loss on those gambling checks?

A. Well, I guess I put it on at the time I made the affidavit, if I ain't mistaken—it might be that because I can't remember.

Q. How long after the loss was that?

A. That was in 1902.

Q. These gambling tables you spoke of, what had happened to them?

A. Well, they all, came apart—all of them came apart from the seam.

Q. Did you repair them and put them together?

A. Some of them I did; yes. Some of them I did use.

Q. How many of them did you fail to put together?

(Testimony of Frank G. Peterson.)

A. I put—I fixed up crap tables, and I fixed a wheel table.

Q. How many tables were there altogether?

A. There were eleven tables altogether and twelve with the crap table that I took up. It was just stuff cut out ready to be put up there.

Q. How many of them did you finally put together?

A. The crap table and the faro table and the roulette table and the stud poker table, and I thing that was all I put up. The rest was all—well, they were, the paint was cracked and wood, you know, and all to pieces, so that I never did get anything out of them.

Q. How much do you think was the loss on the tables?

A. Well, I estimated that to be 50%.

Q. This ginger ale you spoke of—that was in cases, wasn't it? Bottles—barrels? Some bottled ginger ale that was packed in barrels, I believe you said you didn't remember about that? A. Yes.

Q. Now, the bar fixtures, how much damage had been done to that?

A. I estimated the bar fixtures a total loss, because it was certainly in an awful condition. It was all apart.

Q. That had been damaged some by the fire?

A. Well, it was scorched a little.

(Testimony of Frank G. Peterson.)

Q. There were three rolls of scenery you spoke of, that was stage scenery, wasn't it?

A. Yes, sir.

Q. Had any of them been on fire?

A. No; it was all rolled tight and fitted, but it stuck together. It was no good at all and even that canvas because that is awful, thin, light canvas. It couldn't be used for anything.

Q. Now, this Guinness' Stout, that was in cases, wasn't it? A. Barrels.

Q. How much was of that was saved? It was in bottles and put in barrels?

A. I don't remember that.

Q. Now, Hostetter's Bitters, that was also bottled and in barrels, wasn't it? A. Yes, sir.

Q. How much was that damaged?

A. That was 80%, I think.

Q. Do you remember the cases of sherry wine?

A. Yes.

Q. How much was that damaged?

A. It was damaged 100%.

Q. Now, do you remember the De Compey Bitters? That was in cases. How much was that damaged?

A. I think that was 100%, too, as I put it.

Q. This Rock and Rye; do you remember about that?

(Testimony of Frank G. Peterson.)

A. Well, that was 100%.

Q. How was that put up?

A. The Rock and Rye was in bottles, too—cases.

Q. There was one case of port wine; was that bottled also?

A. The port wine? There was some port wine I put at 80%—I have forgotten now, there were so many different lots.

Q. There were ten cases of cherries; do you remember how much they were damaged?

A. That was 100%.

Q. And the Irish whisky?

A. Well, that 100%.

Q. Now, these boxes of lay-outs; what are lay-outs?

A. Well, they are to put right on—that is, oil-cloth and billiard-cloth—they make them also out of billiard-cloth—all different kinds of figures in gold on the cloth, put right on the table.

Q. On the roulette table or faro table?

A. The roulette table, not on the faro table; the roulette table and Klondike tables—chuck-a-luck.

Q. There were two boxes of them?

A. Yes, sir.

Q. Did you not succeed in using any of these lay-outs? A. No, sir.

Q. They were a total loss?

(Testimony of Frank G. Peterson.)

A. A total loss. We used them in our tent to throw down on the floor to keep the wind out.

Q. Now, there were two Hazard cups; what are they?

A. Yes, sir; I think I put those at 75%. They are cups, you know.

Q. What was the matter with the roulette wheel?

A. All the veneer was off of it, and twisted. I had an awful time on them.

Q. Did you finally repair it?

A. I got them so that they worked.

Q. How much was the damage to them?

A. I had a contract on that of $225.

Q. How much was that damage to the roulette wheel, do you think?

A. Well, really, if there had nobody been there to fix that, that would have been a total loss on them—a total loss.

Q. And the bookmaker's wheel?

A. Well, that was also a total loss.

Q. This shotgun, what was the matter with that?

A. It was rusted all through. That was the finest kind of a gun made.

Q. Did you repair that?

A. No; I didn't touch it at all.

Q. Do you know whether that was repaired or not?

(Testimony of Frank G. Peterson.)

A. I do not. There is two revolvers there, I put them at 75%. A. Yes, sir.

Q. That was your estimate of it?

Q. This enunciator, was that ever used?

A. Yes, sir, I guess it was. I fixed it.

Q. Was that damaged? A. Yes, sir.

Q. And how much was that damaged?

A. Well, I estimated that at 75%. I don't remember now.

Q. What was the damage to the barrels of Guggenheimer's whisky?

A. Twenty-five per cent.

Q. What was the damage to the 5 barrels of Old Crow? A. Well, the same amount.

Q. And twenty barrels of Lacey whisky?

A. Well, I put all those whiskies about the same thing. I estimated there was a loss of from 15 to 16 gallons a barrel.

Q. Those doors that you spoke of—what happened to them?

A. They all came apart—not exactly apart. Now, you know the joint—those won't come clear apart, but it will spring away—it will be an eighth of an inch. When them panels swell up they will bring it up—because those work up and open an eighth of an inch all around.

Q. Did you repair them?

(Testimony of Frank G. Peterson.)

A. I did not; I didn't have anything to do with them.

Q. Do you know whether they were ever used afterwards? A. I don't think they were.

Q. What was the amount of the damage to those doors? A. I believe I put that at 80%, I think.

Q. You spoke of a package of mirrors; what happened to those mirrors?

A. Broken—they were broken.

Q. All of them? A. Yes, sir.

Q. How much damage would you estimate?

A. There were two lots of mirrors—I forget which lot you refer to.

Q. Package of mirrors and crate of mirrors.

A. The crate of mirrors was all broken—all smashed to pieces.

Q. How did they happen to be smashed?

A. I couldn't say.

Q. Had they been broken in handling or something fallen on them, or what?

A. Well, I don't know anything about that. They were broken when we found them. We found them in that condition.

Q. There was a bale of carpet; what happened to the carpet?

A. Well, it must have been the steam and smoke—it was in an awful condition, really.

(Testimony of Frank G. Peterson.)

Q. What had done the damage to it; the steam or smoke? A. I suppose the steam and smoke.

Q. It had been discolored by the smoke?

A. I wouldn't say it was just exactly discolored, but you spread them carpets out and there would be places they would be just as black as could be—seemed like dirty water had been on it. It would be spotted all over. You couldn't do nothing to it.

Q. It was blackened with the smoke?

A. No; I don't think hardly that it was blackened with the smoke, really, but I think there naturally dripped over some stuff wet—that made them black that way. I think there was one bundle of carpet that I saw that had been pretty close to the fire, I don't think the others were.

Q. This bundle of carpet you had seen pretty close to the fire, had they been burned any?

A. Yes, sir; there was one bunch I think was scorched a little, but not burned—I couldn't say exactly burned.

Q. Now, you spoke about three cases of tinware upon yesterday; what happened to that?

A. Well, it was pretty cheap tinware, and as soon as it stands in the steam and heat and wet for some time, why you know how it will turn—make rusty spots.

Q. How much do you think that was damaged?

A. I think I put that at 35%.

Q. Twelve cases of flasks; what happened to them?

A. Well, that was whisky flasks—well, they were

(Testimony of Frank G. Peterson.)

all broke—all smashed. Where they had been, I don't know. We didn't get anything out of them at all.

Q. Do you remember the 13 cases of cigars? Did you examine them?

A. I handled all of the cigars.

Q. What was the condition of the 13 cases you testified about?

A. Pretty much the same condition all through, all of them.

Q. How much were they damaged?

A. About 75%.

Q. Do you remember the 14 bales of corrugated iron? A. Yes, sir.

Q. What was the matter with that?

A. Well, the paint was coming off of it. I estimated that at 25% loss because it couldn't be repainted again and rusty.

Q. Was it used afterwards?

A. I do not know whether it was used or not.

Q. Now, you spoke of six tents? A. Yes.

Q. What happened to those tents?

A. They were all dirtied up, you know, and smoked up.

Q. How much do you think they were damaged?

A. I would call it a tent, when it was all smoked and can't be cleaned and everything else,—I think it was 50%.

Q. You spoke of two crates of stovepipe. What is the matter with that stovepipe?

(Testimony of Frank G. Peterson.)

A. That was also rusted—wasn't able to get much out of it.

Q. Couldn't it be repolished?

A. Oh, no; that kind of stovepipe can't—Russian pipe, or whatever they call it—that glazed pipe—you can't polish it. After the rust has gone through it you can't do nothing with it.

Q. How much do you think that was damaged?

A. I put that 35%.

Q. Three cases of fire extinguishers; what was the matter with them?

A. Well, they were all—the paint came off of them, and some of them was dinged, too.

Q. Some of them were what? A. Dinged.

Q. Dinged—indented? A. Yes, sir.

Q. Then, they had been partially injured by coming in contact with something else?

A. With something else.

Q. That was what indented them?

A. Yes, sir.

Q. How many of them were injured in that way?

A. I couldn't exactly tell.

Q. Well, how much do you think those were damaged? A. About 25%.

Q. Why do you say those were injured 25%, on what do you base your estimate?

A. Well, it looks to me like when a thing is injured, I think—I wouldn't buy anything—I really

(Testimony of Frank G. Peterson.)

think they were injured that way. I wouldn't have it at 25% less than the value of it.

Q. What was the condition of the glue, varnish, paint and such stuff?

A. That was all melted up together with all the rest—run right in between everything. You know how glue would be.

Q. What was the condition of the mattresses?

A. Well. there were a few mattresses that was—well, the mattresses was wetted all through, you know, of course, and spotted. I think I saw one mattress—two that were scorched some.

Q. You think the flames reached these mattresses?

A. No, I don't really think the flame, but really the heat right from the flame—looked like they might do that, because that was closed up so that it couldn't burn—it might have—I couldn't say.

Q. Do you know what was done with their barreled whiskies finally?

A. Well, I guess—I don't know exactly what they were done with—no, I couldn't testify to that, really.

Q. That is all.

(Testimony of witness closed.)

W. A. MALLOY, recalled for further direct examination, testified as follows:

Q. (By Mr. BRINKER.) I believe you stated, Mr. Malloy, that the vessel arrived in Nome about

(Testimony of W. A. Malloy.)

the latter part of June or the first of July, did you not? What time did she arrive there?

A. She arrived in Nome June 18th, I think.

Q. I mean after she came back from the quarantine? A. About the 28th of June.

Q. And the cargo was gotten ashore, as I recall your former testimony by July 3d, wasn't it?

A. About that time; yes, sir.

Q. Now, after the cargo was put ashore, just state where it was put first?

A. It was landed on the beach, first, then it was taken up and put into the warehouse.

Q. How did you happen to remove the cargo of the Standard Theater Company up to the warehouse of the Standard Theater Company?

A. How did we happen to move it?

Q. Yes, sir.

A. Well, the Seattle-Yukon Transportation Company had it moved up in the warehouse.

Q. They were the charterers of the vessel, were they? A. Yes, sir.

Q. Well, did they notify you to move it up there to the Standard Theater Company's warehouse?

A. Yes, sir.

Q. They were operating the vessel, were they?

A. Yes, sir.

Q. What reason did they give for wanting you to move it up there?

A. Well, they seemed to be crowded for room, and Mr. Wood said there was an adjuster there that

(Testimony of W. A. Malloy.)

wanted to make a survey there of the goods, and I had went to him a good many times about it—asked him where the adjuster was—he seemed to be always busy—couldn't get around to it—and so I finally ask him if I would lose my right by having the goods moved to the big tent of the Standard Theater Company, and having the survey made up there. He said no; as soon as Mr. Gullin got around to it, he would go up there and make the survey of the goods.

Q. And then you moved them up there?

A. Yes, sir.

Q. After they were put up there in the big tent of the Standard Theater Company, then Mr. Gullin came to make the survey, did he?

A. Yes, sir.

Q. At whose request did he make that survey?

A. Mr. Woods.

Q. Now, what kind of an examination did Mr. Gullin make when he was examining those goods?

A. I should judge a very poor examination.

Q. Just state the manner in which he went through the goods, state, first, how the goods were placed in the warehouse?

A. Well, we piled them up the best we could—had six or seven men working there, tried to separate everything as much as possible. Mr. Gullin

(Testimony of W. A. Malloy.)

got there about ten in the morning, and got away at 3:00 in the afternoon. He would take case goods, barreled goods and packages and just make a guess at them, and say they were damaged so much.

Q. Did he open any of the packages to make his examination?

A. There was a couple opened, yes, sir—two or three packages opened, and everything looked all right in the packages. After he made the examination—after he got all through, two or three days work—we went all through the packages and found them very much damaged.

Q. After he had made his examination, state whether or not you made an examination of the goods—cargo, for the purpose of determining the extent of the damage?

A. Yes, sir, I made an examination—went all through the goods; had two men with me—two disinterested parties.

Q. Now, taking the cargo as a whole, of the Standard Theater Company, from the examination that you made of it, how much was it damaged, Mr. Malloy?

Mr. POWELL.—I object to that as incompetent, irrelevant and immaterial; the witness is not competent to testify.

Q. Now, at the time these hatches were opened up, you stated before, I believe that some of the

(Testimony of W. A. Malloy.)

packages were taken out of the hold and they were so badly injured they were thrown overboard?

A. Yes, sir; there was some thrown overboard.

Q. Whose packages were those; did they belong to the Standard Theater Company, or to whom?

A. They belonged to the Standard Theater Company.

Q. The Standard Theater Company?

A. Yes, sir.

Q. Now, in the case of the 75 cases of champagne, were any of those cases mislaid, when the cargo was unloaded there at Nome? A. Yes, sir.

Q. How many cases?

A. About 13 or 14 cases.

Q. Now, was that champagne injured in any way by the efforts that were made to put out that fire—by the steam or the water?

A. Yes, sir.

Q. Now, to what extent?

A. Well, that was mostly all damaged by heat and steam. There was one place the fire burned some of the cases, but not many of them—very few.

Q. Were any of the bottles broken by the fire, did you notice?

A. Yes, sir—cracked—broken. The bottom was out of some of them—in very bad shape.

(Testimony of W. A. Malloy.)

Q. Did the fire burn through the cases—those that you examined the scorched cases?

A. There was one case, one-half of the case was burned through one particular case and the others was scorched. Probably six, seven or eight cases were scorched.

Q. Now, what condition were those 75 cases in—that is, the balance of them that were landed—as to damage, and to what extent were they damaged?

A. They were a total loss.

Q. A total loss?

A. Not good for anything.

Q. Just describe the condition they were in, as you recollect it, after you opened up the cases?

A. Well, we found the bottles cracked—the bottom out of the bottles, and then we would find a cork and capsule in the bottle perfect, but there wouldn't be any wine in the bottle—or might be full, quarter full, or three-quarters full—but none of them perfect.

Q. Now, did you taste any of the wine that was left in any of the bottles?

A. Yes, sir.

Q. What was the condition of it?

A. It tasted like vinegar; it didn't taste like wine.

Q. It was spoiled, was it?

A. Yes, sir; had a kind of a sour taste.

(Testimony of H. J. Gordon.)

Q. That is all.

At this time an adjournment was taken until July 20, 1904, at 2:00 P. M.

July 20, 1904, 2 P. M.

Continuation of proceedings pursuant to adjournment. All parties present as at former hearing.

H. J. GORDON, produced as a witness in behalf of libelant, being first duly cautioned and sworn, testified as follows:

Q. (Mr. BRINKER.) State your name.

A. H. C. Gordon.

Q. Where do you live?

A. In Seattle at present.

Q. Were you in Nome in June and July, 1900?

A. I was.

Q. Were you there when the Santa Ana arrived?

A. I was.

Q. Did you see the cargo of the Standard Theater Company's that was shipped in there on the Santa Ana? A. I did.

Q. And which arrived there in July, 1900?

A. I did.

Q. What was the condition of that cargo when it was landed as you saw it?

A. Well, the cargo was in a badly damaged condition, many of the packages showing the marks of fire

(Testimony of H. J. Gordon.)

and many others of them showing indications of heat and steam, as I took it to be.

Q. Any indications of water?

A. Yes; there were indications of water also.

Q. Did you see the cargo after it was moved from the place where it was landed on the beach up to the tent warehouse of the Standard Theater Company?

A. I did.

Q. Did you examine that cargo while it was in the Standard Theater Company's warehouse?

A. Yes, sir; I think I can say that I made a pretty fair examination of it.

Q. Were you there when Mr. W. W. Gollin, representing the insurance company, made the examination of it? A. I was there present.

Q. What kind of an examination did he make?

A. Well, it is what I consider a very brief, cursory examination; if my memory serves me correctly he was there a portion of three different days, as I recall now he came about noon each day, and one day he went away very soon after he arrived, and the other two days he was there probably two or three hours or maybe a little longer.

Q. Was the cargo in such a condition that it could be examined thoroughly by him at that time?

A. No, it was impossible for him thoroughly to

(Testimony of H. J. Gordon.)

examine the cargo, as the goods were placed there in the time that he was there present.

Q. How were they?

A. They were piled up, in some instances, higher than this ceiling.

Q. Did he take them down and go through the various items or articles? A. No, he did not.

Q. Taking the cargo as a whole, from the examination which you made, what would you estimate the damage to the cargo from the steam and water and heat, as a whole, if it had been put up for sale in the usual way at wholesale?

Mr. POWELL.—I object to that as irrelevant, immaterial, incompetent; the witness has not shown himself competent to testify.

A. Well, I should say, taking the entire cargo as it stood there in that place of storage, that it was damaged to exceed 50 %.

Q. Altogether?

A. Altogether—the entire cargo.

Q. Now, I will call your attention to some of the items in the cargo specifically. There were 28 cases of bar fixtures? A. Yes, sir.

Q. What condition were they in?

A. Well, those bar fixtures, some of them were scorched by flame, and in some instances the joints seemed to be swollen by the action of water, but more

(Testimony of H. J. Gordon.)

generally they seemed to be injured by the effects of heat or steam, probably steam, that is, wherever the parts were glued they came apart. I should judge that the chief damage to that particular part of the cargo was from the steam.

Q. Now, taking the bar fixtures as they were there, in the condition that they were landed, what would you say was the extent of damage?

A. Well, as they stood there, when they were delivered on shore they were not worth anything; they could not be said to have any value, as conditions existed there.

Q. Then there was a piano, do you remember the piano? A. I remember the piano very well.

Q. What was its condition?

A. Its condition was simply this: The strings were rusted and one or two of them were on the eve of breaking; the rust had eaten them off; they were generally in a rusty condition. I did not consider the piano was worth anything—I would not have it as a gift myself.

Q. Then there were three rolls of stage scenery, do you remember those?

A. I remember those very well.

Q. What was the condition of those?

A. Well, they were wet with water and the action of the steam seemed to make the paint run on them, and it was blurred.

(Testimony of H. J. Gordon.)

Q. Could they be unrolled?

A. Not and leave them in any condition that you could tell that it was scenery—they were worthless.

Q. Then there were two packages of drugs, do you remember those? A. Yes.

Q. What condition were they in?

A. Well, they were badly damaged too; in fact I don't think they were worth anything—a good portion of them were wrapped in paper, and some of the stuff was mixed up so that you could not separate it at all; it was all mixed up.

Q. Then there were two packages of stage wardrobes; do you remember those?

A. Yes; those were also damaged badly and practically worthless I would say.

Q. Now, there were ten cases of claret wine in bottles in cases.

A. I recall those very well; from the fact that in examining them we found bottle after bottle with the corks loose, and bottles that were partially empty, some of them almost entirely empty, and some were empty, and a great many that had perhaps one-third of the liquor in them, which, of course, were worthless, having been exposed to the atmosphere, and some of them were in the shape of vinegar, I would say.

(Testimony of H. J. Gordon.)

Q. What would you say was the damage to those cases? A. They were worthless, I would say.

Q. Then they were two cases of gin in bottles?

A. Well, that was practically in the same condition as the claret.

Q. And two cases of Hostetter's Bitters in bottles?

A. That practically was in the same condition, worthless.

Q. Then there was one case of imported sherry wine in bottles? A. The same condition.

Q. Then there were five cases of Gold Medal liquor? A. In the same condition.

Q. One case of Rock and Rye whisky.

A. That was also in the same condition, the corks loose.

Q. And that was worthless?

A. That was worthless.

Q. And then there were two cases of Boonekamp Bitters.

A. That was absolutely ruined; there was nothing of that as I recall it.

Q. And two cases of Angostura Bitters.

A. The same condition.

Q. One case of imported wine.

A. That was also gone.

Q. And one case of Pousse Café.

(Testimony of H. J. Gordon.)

A. The same condition.

Q. And then there were ten cases of cherries.

A. That was also destroyed.

Q. And four cases of Italian Vermouth?

A. That was also destroyed.

Q. And four cases of French Vermouth?

A. The same condition.

Q. One case of Irish whisky?

A. The corks were also loose in that and a good deal of it spoiled.

Q. That was ruined also?

A. Yes, it was not in a salable condition.

Q. And there were four cases of Scotch whisky?

A. That was in the same condition as the Irish.

Q. And there were two cases of W. C. Bitters?

A. That was also spoiled.

Q. And one case of Three Star Hennessy brandy?

A. That was the same as the other.

Q. And then there were two boxes of lay-outs?

A. The heat completely ruined those.

Q. And then there were two roulette wheels?

A. Yes, I remember those. They were practically in pieces. The glue holding them together had been melted and they were in very bad condition.

Q. And those roulette wheels, you regard them as worthless?

A. They were worthless under the conditions—they could not be used at all.

(Testimony of H. J. Gordon.)

Q. Then there was a bookmaker's wheel?

A. That was in the same condition as the roulette wheels.

Q. Then there were fourteen check trays?

A. Those were all in pieces, the glue came out and they were all apart.

Q. Then there were 320 dozen of bicycle playing-cards, what condition were they in?

A. The water and steam both had gotten into those so that they were useless.

Q. Then there were 35 dozen packages of faro cards? A. The same condition.

Q. Then there were five cases of Wild Cherry cordial?

A. Those were in the same condition as the other cherry bitters.

Q. Then there was one box of glass bookmaking outfits?

A. Well, they were along with the roulette wheels, worthless.

Q. And one box of lithographs?

A. They were ruined entirely.

Q. There were two sets of spotted Hazzard dice made of celluloid?

A. Well, it affected those so that they were not true, apparently.

Q. And three sets of spotted dice?

(Testimony of H. J. Gordon.)

A. The same condition.

Q. And three sets of Hazzard dice?

A. I would say in relation to all the dice in the outfit that was taken up there that it was all ruined.

Q. And is the same true of the markers and faro checks?

A. Yes, they were all in that condition.

Q. There was a bamboo fishing-rod, do you remember that? A. Yes, I remember that.

Q. What condition was that in?

A. Well, as I recall it now the metal parts of it were rusted and the rod was warped from the heat. I don't think it was worth anything.

Q. Then there was six Klondike dice boxes?

A. The heat had ruined those.

Q. And there were four dozen and seven book-making balls. A. Ruined.

Q. Two sets of Hazzard dice and one set of fighters dice.

A. All the dice was spoiled.

Q. There were 24 sets of Klondike, magenta, what is that?

A. That is dice; that was in the same condition.

Q. There was 60,000 blank tickets.

A. All the stationery in connection with the theater was ruined; it was all wet and blistered and worthless.

(Testimony of H. J. Gordon.)

Q. Then there were fourteen rolls of paper.

A. I suppose that was building paper, I know there was a lot of building paper and I was trying to think if there was any other paper. There was a shortage of some paper in the cargo, as I recall it, but to classify the paper I could not tell you; I know that the building paper was very considerably damaged, if that is what you referred to; I don't know that I could say exactly the damage that paper sustained, but as I recall it, we attempted to unroll some of it and it stuck together and it seemed that the heat had caused the tar to melt and it all seemed to be a solid mass, and I should think from the condition of it as I examined it, it was worthless. I remember trying to unroll two or three rolls of it and it was all a solid mass of tar and paper.

Q. And then there was a case of corks and labels, glass whisky flasks.

A. I remember there was some damage to those; I don't know that I could tell definitely what the damage might be to those. My recollection is that some of them were broken; quite a number of them were broken, I think probably they were damaged half or three-quarters, anyway, probably three-quarters.

Q. And then there was a case of corks and labels.

A. I remember that they were singed and wet and worthless and out of shape.

(Testimony of H. J. Gordon.)

Q. And then there was a case of glass signs.

A. Some of those were broken—they were worthless.

Q. And three cases of seltzer bottles.

A. I remember very distinctly because of the peculiar design of those; they were all ruined—they were worthless.

Q. Then there were five packages of tickets, reels and ticket machines?

A. Those were damaged too; the tickets were worthless and wet by the water and the machines were badly rusted. I don't think they were worth much for actual use.

Q. Would they have been salable at all?

A. Very little value at the time.

Q. Then there was an annunciator and wires and fixtures?

A. I remember looking at that annunciator a number of times, and I didn't think from my knowledge of that sort of machinery, I do not believe that annunciator was worth anything; it might have been, but I doubt it.

Q. And then there was some dusters and whiskbrooms and things of that kind.

A. Most of those things—I think all those little utensils for keeping the house in order and clean were

(Testimony of H. J. Gordon.)

damaged very greatly; I don't think there was anything of them that was worth anything.

Q. Then there were 50,000 perforated blanks?

A. Those blanks with all the other stationery were wet and ruined.

Q. Four thousand tickets and 2,000 tabs?

A. All that paper stuff was ruined.

Q. Then there were 100 sets of door checks?

A. The same condition.

Q. And 1,000 wine lists? A. Yes.

Q. And 3,000 salary tickets.

A. Those were altogether in bad condition.

Q. Then there were 10 rubber stamps.

A. Those rubber stamps seemed to have been near the heat so that they were affected.

Q. And one pad and the bottle of ink.

A. The bottle of ink was open, as I recall it and spilled.

Q. Then there were 35 dozen packages of faro cards.

A. Yes, all the cards were together and apparently in the same condition—I don't think there was a pack of them that was in condition to use.

Q. Then there were 100 cases of champagne.

A. I remember the champagne very well.

Q. What was the condition of that?

A. Well, I don't know how many cases of that champagne I examined, but a large number of them,

(Testimony of H. J. Gordon.)

along with Mr. Malloy, and I don't recall any single case of champagne that we did not meet with bottles that were half empty or empty, but they had the corks in place, but still they were empty or something like it, and I don't understand yet how it happened, but the bottles were empty just the same, and I should say that that champagne was absolutely unmarketable and I should consider it a total loss.

Q. Then there was a chuck-a-luck tub?

A. Well, that was about the same condition as the roulette wheels.

Q. What would you call it, ruined?

A. I should say so.

Q. Then there was a case of soap and candles?

A. That was also in bad condition. I don't think there was a dozen candles left in the outfit that could be used; the heat had affected them.

Q. Then there was another package of drugs, including chloride of lime and red fire?

A. That was all mixed up together and it was hard to say what kind of a compound it was when we got to it.

Q. It was a total loss?

A. Oh, yes, you could not use it for any purpose.

Q. There was 100 barrels of beer—that was bottled beer in barrels?

A. Yes, I remember it well. I did not examine

(Testimony of H. J. Gordon.)

all the barrels. I can only say this, if permitted, that I sold for the company 3 barrels of that beer to Mr. Ed Powers, who was then alive, and I recall he would not take it at the market price, which I think was probably twenty-two and a half at that time, in Nome, and my recollection is that I got $18 or $18.50 a barrel for it; that was as much as he was willing to give for the beer, considering the fact that it had come through the fire, and he told me afterwards that some of them were—well, he didn't make any serious kick on the price he paid—but with that experience I had in handling those three barrels—I would say that the beer was probably damaged 20% or something like that; I think that would be a fair, conservative estimate of the damage of the beer.

Q. Now, there was a lot of whisky in barrels, do you remember that?

A. I very distinctly remember the whisky. All that I can say about it is this, I remember the barrels, and that the bungholes showed some leakage and there was no gauger there, and the goods were not gauged and I could not estimate the percentage of loss, but the bungs indicated that some liquor had escaped, I could not say what amount; there was an escape of liquor from nearly all the barrels.

Q. Then there was a lot of furniture, bedroom sets, mattresses and blankets and washstands and

(Testimony of H. J. Gordon.)

chairs and bedsprings; what condition were they in?

A. Well, the chairs were in a pretty bad condition; they were shipped knocked down and were rather a cheap grade of chairs glued together, and they were all loose and you could take hold of a bunch of them and they would rattle, and you would have to re-enforce them; and the bedroom sets were in very much the same condition and the springs were rusted and the bed clothing with each bedroom set had a complete outfit of bed clothing for the chamber, and that was, much of it, wet and injured to some extent by the salt water that had been poured in on the cargo at the time the fire was put out.

Q. And to what extent would you say that the furniture was damaged?

A. Well, that furniture, it would be conservative to say that it was damaged 60%; it is a question in my mind as to stating whether, after it was unloaded, whether it was worth anything; it was not worth anything until considerable work had been expended to put it in some sort of repair, and then it would be only second-hand goods after it was repaired.

Q. Do you remember some window sash and window frames? A. Yes, sir.

(Testimony of H. J. Gordon.)

Q. In what condition were they?

A. Well, a number of those window frames in the packages were scorched by the fire and they showed evidences of heat as well, and they were generally damaged, probably 30% at least; I think that would be a very low estimate of the damage done to the window sash and frames.

Q. Now, there were a lot of doors?

A. Yes, I don't remember how many. There was in the neighborhood of fifty doors; they were damaged in the same way that the window sash was; some of them were scorched; three or four of them seemed to have been in the immediate locality where the fire broke out and they were scorched; they were all damaged by the steam, as any door would be when it is exposed to a great heat, and they were sprung and in very bad condition.

Q. There was a lot of painted corrugated iron, do you remember that?

A. Yes, I remember that corrugated iron; there was indications of damage to that. It would be very hard to estimate what the loss would be on that, because the iron was fastened together in bales and perhaps a half a dozen sheets in a bale, and the outside of the bale showed considerable bruising and apparently some effects of the heat, and a lot of warping; it would not pass as new stuff in the market. I should

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think that 15% damage on that would be a very conservative estimate of the damage.

Q. Then there was a lot of builders' hardware?

A. Yes, there was a number of bundles of builders' hardware; I don't remember how many packages; I couldn't tell you exactly how many, I know there was quite a lot of them—eight or ten packages of various things, some nails. All the metal of any kind showed a great deal of rust. I remember distinctly that the bales had been wet and had rusted so that great numbers of them were rusted together and you could pick up a bunch as big as your fist, they were so badly damaged by the time they were opened; those nails I do not consider worth anything at all, and the hardware could not be used for any first-class building; it would have to be sold as junk. I should think the average loss on the hardware would not be less than 60% anyway.

Q. Then there was a lot of carpenter's tools?

A. Well, all the iron that was exposed in this way was in about the same condition—not much difference.

Q. What would appear to have damaged it?

A. Well, I think the salt water was one of the main things, because salt water very quickly corrodes anything with a polished surface—it would

(Testimony of H. J. Gordon.)

show the marks very quickly and it would be simply a second-hand proposition immediately.

Q. There were two skeleton safes; what condition were they in?

A. I remember them. They were blistered outside from the heat; I don't know that the interior of the safes were damaged, but they looked like they were through the fire, and the appearance of the safes was such that one would at once realize that they were through the heat.

Q. Did they bear any evidence of injury from the steam?

A. I think so, and certainly, in order to be put in any condition at all they would have to be scraped and revarnished, which would cost considerable. I should think those safes were damaged 25%.

Q. Now, there were six Hazzard cups?

A. Yes, those were dice cups; I am not very much familiar with the market for those things up there, but they were in very bad shape; they looked like they might have been damaged half their value.

Q. And there was a round card-cutter?

A. That was also damaged; it was rusted and in bad shape and I should think probably damaged half its value.

Q. And the same with the trimming shears?

(Testimony of H. J. Gordon.)

A. Yes, sir, about the same.

Q. And then there was a Parker shotgun?

A. Yes, I remember that.

Q. What condition was that in?

A. Well, that was quite a good deal rusted in the barrels, and there was some spots in there, which after polishing did not disappear. That gun, I should think, was probably injured—I could not tell how much it would affect its shooting value, but anyone that knows anything about a gun don't want one with a rust spot in the barrels; I should think that 25% of its value anyway.

Q. There was a number 36-caliber Marlin rifle?

A. That was about the same condition as the shotgun.

Q. And the 22-caliber?

A. Yes, sir, the two rifles and the shotgun and I think possibly a revolver.

Q. Two revolvers?

A. They were all rusted from the effects of the water and the steam.

Q. And there was a pair of large shears?

A. Well, I guess they were in about the same condition as the other pair of shears, rusted.

Q. There was three fold-up faro lay-outs?

A. I don't recall them—I don't recall how many of them—I know there were faro lay-outs and I

(Testimony of H. J. Gordon.)

know they were injured probably from forty to fifty per cent.

Q. And three case keepers?

A. Well, those were in about the same condition as the lay-outs.

Q. And three faro boxes?

A. Those faro boxes I don't remember the condition of those boxes, I know there was some faro boxes belonging to the outfit, but I don't remember the condition.

Q. And there were faro cloths?

A. I know that the cloths were moist from the water or the steam so that some portion of the cloths was absolutely ruined; a portion of it could be cut so that it could be used; I should think there was one-third of that cloth that was worthless.

Q. And then there were four card cases.

A. They were damaged some, probably one-third of their value.

Q. And then there was a lot of muslin and calico and cheese-cloth.

A. All that paraphernalia about the stage I should think was damaged 25%.

Q. Then there were two cases of toilet paper.

A. Yes, I remember some of that toilet paper was damaged and wet and it is possible that under the conditions that existed there it might be used, but as

(Testimony of H. J. Gordon.)

a marketable article I do not think it was salable—probably 50% damage.

Q. One case of wood brackets.

A. That was in the same condition as the other furniture; where they were glued together they would come apart and they had to be re-enforced and re-glued before they could be used at all; probably 50% damage.

Q. Thirty-six packages of sewer pipe and T's and chimney pipe.

A. Yes; there was quite a good deal of that sewer pipe that was seemingly cracked; some of it when it came off the ship would seem to come apart; I don't know how to account for that unless they were in the neighborhood of the extreme heat. I helped to handle that sewer pipe myself and it was handled very carefully after it came ashore, from the fact of its condition and we wanted to save all we could of it; I should say that sewer pipe was damaged through the extreme heat.

Q. If it had been heated and then water had been suddenly poured on it—

A. It would cause it to crystallize and crack, there is no doubt about that. I always supposed, and we thought that was the cause of the damage.

Q. Then there were two bundles of canvas.

(Testimony of H. J. Gordon.)

A. Yes; there was a number of bundles of canvas all told.

Q. Some canvas partitions and tenting and things of that kind.

A. That was all wet and heated more or less by the steam and discolored; it certainly under the conditions that existed, would not have sold for over two-thirds of its value, or over half.

Q. Then there were five cases of tinware from the Standard Furniture Company, do you remember that?

A. Yes, I remember that; it was for the mess; it was rusted and in bad condition.

Q. Then there was a lot of other kitchen ware from the Golden Rule Bazaar.

A. All that stuff was in the same condition; I should think it was damaged 40% anyway.

Q. Then there was a lot of tents and tent partitions.

A. I had reference to those a while ago; I included them all.

Q. Then there was two crates of stove pipe.

A. I remember the stove pipe was in a very rusty condition, I don't know exactly what it would be damaged, but I should think, so far as putting it on the market, it would not be salable.

(Testimony of H. J. Gordon.)

Q. You mentioned nails and the condition they were in. A. Yes.

Q. Now, there were ten cases of mineral water?

A. Yes.

Q. Do you remember what condition it was in?

A. Yes, that mineral water was very much the same as the other case goods—the case goods were all alike, that mineral water, as I recall, there was not any of that mineral water that was fit for use, or if there was any gotten out of it it was by opening the cases and getting a bottle here and there; my recollection is that that was all bad.

Q. Then there were three cases of fire extinguishers.

A. Yes; that is hand fire extinguishers; I don't know that the internal apparatus was injured, but they were marred and discolored and they were certainly pass for second-hand goods. I should think the selling value would be injured probably one-third.

Q. Then there were two bundles of carpets?

A. Yes.

Q. What condition were they in?

A. Those carpets were injured by moisture; I don't know whether it was from the moisture of steam or water, but they were in bad condition. Conservatively speaking, I should think that they were injured to one-third of their value.

(Testimony of H. J. Gordon.)

Q. Then there were a lot of bar glassware purchased from Harrison-Treat; do you remember about that bar glassware in barrels and cases.

A. Yes, I remember there was several hundred dollars' worth. There was more or less of that broken. I could not be able to give as careful an estimate on that as the other goods, because I did not examine it piece by piece; I know there was considerable breakage in it, and my recollection is that at the time I assisted in making up the loss we figured that up about 35 or 40%, I think.

Q. Now, there were about 70,000 cigars, do you remember the condition of those?

A. Yes, I remember the cigars. There were two large cases, as I recall, that cigars were packed in; and those cases were charred; they had been very near the seat of the fire and where it had raged the fiercest and the boxes were charred and the cigars—a good many of them—I smoked some of them myself—a good many of them seemed to be affected by the heat; dried out—they were very dry. The heat seemed to have passed through the cases sufficiently to dry them out so that they were not in a good condition, particularly the higher priced goods. There was one case of goods, as I remember, which would retail for four bits up there; that box of the higher priced ones seemed to be dried out and in very bad

(Testimony of H. J. Gordon.)

condition. They were—as they stood there when we opened and examined them—they would not be marketable at full value I don't think, at least they would not to me.

Q. Had any of them been affected by the water or by steam?

A. I think there was a few boxes on one side of each box that was moist, that had been affected by the moisture, I don't know whether it came from steam or water.

Q. Did you see them after they were opened and spread out down there at Tom Erchart's place?

A. I did not go down; I only saw them when they were opened in the storeroom. I know there was some of them in very dry condition and some that were moist on one side of the box and in bad condition, but I don't know the exact damage done to the entire invoice of cigars, but those that I saw that were damaged were practically worthless.

Q. Is there anything else in that cargo which you recollect that I did not ask you about, that was damaged by water or steam?

A. I don't recall any of the items now. I think that the items you suggested comprised just about all that cargo as I recall it. Of course, there was so many items that there might be small items that I do not pretend to remember.

(Testimony of H. J. Gordon.)

Cross-examination.

Q. (Mr. POWELL.) What connection did you have with the Standard Theater Company?

A. At the time when I left here and landed at Nome I was supposed to be in their employ as a book-keeper.

Q. Did you go up on the "Santa Ana" yourself?

A. No, sir, I went up on the "Oregon" ahead of the "Santa Ana."

Q. You were there when the "Santa Ana" came in?

A. I was there when the "Santa Ana" reached port and when the goods were unloaded.

Q. Were there any wharves at Nome in 1900?

A. No.

Q. All vargo was unloaded by lighters?

A. Unloaded from the lighters.

Q. And when it was unloaded it was piled up on the beach?

A. Yes, it was piled up on the beach; all those goods were piled in the warehouse—the S. & Y. T. Co. had a warehouse with a roof over it and those goods were taken at once from the lighters and carried into a covered warehouse.

Q. Now, it was while it was in this S. & Y. T. Company warehouse that the examination was made by Mr. Gollin? A. No, sir.

(Testimony of H. J. Gordon.)

Q. After it was taken up?

A. It was examined in the Standard Theater Company's building.

Q. Mr. Gollin did not make his examination until after it was taken up to the Standard Theater Company's building?

A. Let me tell you for your information. The goods, by agreement of the parties, was released from the S. & Y. T. Company warehouse and by agreement taken up to the theater buildings—to the other place where there was more room and more commodious, and it was there examined.

Q. It being agreed that that removal of the goods from the S. & Y. T. Company warehouse to the Standard Theater Company warehouse should not prejudice the rights of either party until the examination shoul be made?

A. That was my understanding.

Q. Now, I understand you to say, Mr. Gordon, that a a good many of the packages showed evidences of there having been a fire and a great many of them showed evidences of having been damaged by the heat and by the dampness. I also understand you to say that that dampness was caused by either the water or the steam that was turned in to extinguish the fire. Now, can you tell when any article was

(Testimony of H. J. Gordon.)

damaged by the heat, whether that heat was caused by the steam or by the fire?

A. No, not always. Where a package showed a char from flame it would be pretty clear that the damage would come from the heat of the flame, although some packages that showed charred, also showed evidences of the heat or water.

Q. Do you remember what was the object of this examination that was made by Mr. Gollin?

A. Well, as I understood it, Mr. Gollin was an official adjuster representing the insurance company who had written this policy on the goods, and that he was there acting in his official capacity for the purpose of adjusting that loss. That was my understanding in the matter.

Q. Now, these bar fixtures I understand you to say, were scorched some by fire and damaged by the heat, in what way had the heat damaged it; did it cause it to come apart where it was glued together?

A. Yes; for instance the veneering all over was blistered. It would be in a wavy form and it was all loose. Of course it is pretty difficult to get that veneering back in the condition it was before, after it was sprung by heat and moisture.

Q. Now, had the fire gotten at the piano?

A. My impression is that one corner of the piano box showed evidences of scorching, but the interior

(Testimony of H. J. Gordon.)

of the piano, when they opened it up, showed the evidences of moisture, because the wires or strands, nearly every one of them, was rusted, and I remember distinctly calling Mr. Malloy's attention to one or two and I cautioned him to handle them carefully or the strings would be broken before the examination.

Q. The principal damage to the interior of the piano seemed to be from the steam and the water?

A. I should judge it was from moisture and heat together; I don't think the flames of the fire injured the interior of the instrument—I would not be prepared to say.

Q. You do not think it burned through the casing?

A. No, sir, it did not burn through the casing because the casing was not burned through; it was manifest that the heat came from the steam rather than heat coming from flames that injured the piano.

Q. How badly was the casing of the piano charred, as you remember?

A. Well, you didn't understand me to say that the finished casing—

Q. I mean the box it was in.

A. Well, it was discolored on one end or side—now I don't know exactly as to whether it was the end or side, but one or the other, it was charred and dis-

(Testimony of H. J. Gordon.)

colored from having the smoke color that comes from being adjacent to flame.

Q. Now, those rolls of scenery which you speak of; that was scenery that they were going to use in the theater?

A. That was my understanding of it; it was painted scenery.

Q. And the action of the heat had caused the paint to run?

A. The action of the heat had caused the paint to run.

Q. Was there anything to indicate to your mind how close that scenery had been to the fire?

A. No, if there was any evidence of that kind I do not recall having noticed it. I do not recall any charred appearance or any burned appearance on the outside of the rolls—there might possibly have been.

Q. Now, take the stage wardrobe; that was costumes for the actors.

A. Yes, costumes for the actors.

Q. What was that composed of, made of, cloth of them case goods. I left the concern after we had

A. Yes, fabrics of various kinds; some of the cheaper class of goods.

Q. What had caused the injury to that?

A. Well, I should say that it was mainly from moisture.

(Testimony of H. J. Gordon.)

Q. Was it washable stuff?

A. Well, I don't think there was very much of it after it was put through a washtub would be very suitable for the stage; it didn't look like that. It was that gaudy stuff that was used for stages up there; it would not lend very much illusion after it passed through the washtub.

Q. Now, you testified to cases of various kinds of wines and liquors and bitters and mineral waters, known as case goods; what had caused the injury to those goods, or could you tell?

A. Well, there could be no question but what the injury was caused by the heat in some form, whether it was applied through hot water or through the hot steam or flames, I am not able to say.

Q. Were any of those liquors afterwards sold by the Standard Theater Company?

A. Well, I have no knowledge of the sale of any of them case goods. I left the concern after we had gone through the goods and handled it in the whole, and I helped them to make up the list; in fact after I had assisted Mr. Malloy in making up a supplemental claim of loss I went at other work, so as to what was sold I am unable to say, except I testified that myself I sold three barrels of beer to Mr. Powers.

Q. This building paper which you spoke of was tarred paper? A. Yes, sir.

(Testimony of H. J. Gordon.)

Q. And the heat caused the tar to run and the paper to stick together? A. Yes.

Q. Could you tell by the look of this glassware, and in that I include all the different kinds of glassware, whether it had been broken by the heat or by handling?

A. Well, that probably would be an inference on my part other than positive knowledge by an examination. The location of the stuff that was broken and the secure manner in which it was packed, and it certainly was very well packed—led me to the conclusion that the breakage had come from the heat. There was no other way that I could see; the glassware being securely boxed and cased and well packed, I could not see how the individual pieces might be broken by rough handling, it seemed to me that it must come from the other cause, and I was led to that conclusion from the fact that I helped to handle those goods myself. Mr. Malloy put me in charge of the goods at the S. & Y. T. Company warehouse and I helped to handle the goods from that warehouse into his own warehouse, and I know the breakage did not occur from the handling.

Q. Were you present when it was loaded here?

A. No, sir.

Q. You do not know what part of the vessel it was loaded in?

(Testimony of H. J. Gordon.)

A. I do not pretend to know anything about the location of the goods in the cargo.

Q. There was one case of corks and labels, what had injured those things?

A. Well, those corks evidently were thoroughly saturated with water and had been thoroughly heated and they were not in a box—they were in a sack, as I recall, and the sack showed some discoloration by smoke, showing it had been in the near neighborhood of the fire, as well as the water and steam.

Q. Some of that package had been singed by the fire?

A. That is my recollection that it had been; it had not burned through the bag, but it showed that it was in close proximity to the fire.

Q. What was the matter with this bottled beer that was in barrels?

A. I am not prepared to say that there was anything the matter with it positively, I can only tell you the experience I had in selling those three barrels of beer, which sale I made to a practical saloonman who had been in the business all his life, and he claimed to me that the heat to which the beer had been exposed would cause it to deteriorate, and I know from personal knowledge that it is necessary to keep beer in cold storage in that country in order for it to retain its value and flavor; that this beer had been a

(Testimony of H. J. Gordon.)

long way from cold storage during the voyage, and I believed then from my own knowledge, personal knowledge, and from what the saloon-keeper told me, that the beer had and undoubtedly would deteriorate, in fact Mr. Powers told me after he opened some of the beer and just before he was taken ill, that some of the bottles were flat; they did not have any gas in them; that it had deteriorated.

Q. What did they do with the whisky that was in barrels? A. Well, I only know from hearsay.

Q. Now, those window frames and doors, they were put up in a crate? A. In a crate.

Q. And this corrugated iron was painted?

A. Yes.

Q. And the injury to that was largely from the fact that the paint came off?

A. Yes, I think that was the main injury; it made it look like second-hand.

Q. Now, did not the smoke do some damage?

A. Yes.

Q. Now, for instance the carpets.

A. The carpets and probably those wardrobes or those robes and costumes that we were speaking of; doubtless the smoke had something to do with that; of course there was a great deal, a large portion of the cargo that the smoke would not hurt naturally,

(Testimony of H. J. Gordon.)

being bottled goods and dry goods and barreled goods.

Q. Those things like muslin and calico.

A. It would discolor it naturally, where it touched it.

Q. As a matter of fact, did not the smoke discolor most of that stuff?

A. Well, I think it is likely it did discolor it to some extent.

Redirect Examination.

Q. (Mr. BRINKER.) There was a roll-top desk; I will ask you in what condition that came ashore?

A. I recall the roll-topped desk because we had to get it in shape so that we could use it up there when I was in the employ of those people. That desk when we uncrated it, was in pretty bad shape. The carpenter that was with the concern had to work with that quite awhile so as to get the top to roll back, and it was in bad condition at the time that I left there. The desk was—well, the effect of the heat was such that it made it shaky, it was not firm as a desk should be; it would rattle in opening and closing; the drawers were loosened and where there was any glue to the desk it was affected in the same general way that all the balance of the woodwork was.

(Testimony of H. J. Gordon.)

Q. Now, how much would you say it was damaged?

A. I should think that to put that desk in the market in the condition it was when we opened it up it would not sell for half the price—I should think it was damaged 50% at the time it was opened.

Q. Do you remember of the Standard Theater Company employing a cabinet-maker named Peterson to repair some of this stuff and put it in shape?

A. Yes, I remember he was around there all the time at work while I was with the people.

Q. Do you remember how much he was paid per day or per hour?

A. My recollection is that Mr. Peterson—I received the information from him that he was getting two dollars an hour; I can only say, from my experience there and knowing what the current rate of wages was, that that would have been about the wages which he should have received, because rough carpenters received one dollar and a half an hour and common labor one dollar an hour.

Q. Did you attend to the payment of Mr. Peterson? A. No, sir, Mr. Malloy paid him.

Q. He was at work there?

A. He was there the whole time I was there and for a long time afterwards, as I was in and out from the creeks I used to drop in there once in awhile and

(Testimony of H. J. Gordon.)

I saw Mr. Peterson in there a number of weeks after I went out, I don't know how long.

Q. There was a lot of groceries, do you remember the groceries?

A. Yes, I remember there was a lot of groceries taken up for the mess, I do not recall what quantity, but I know there was quite a number of packages of various sorts, some of which were badly damaged and others that had been well cased and not so badly damaged; I should think that those groceries were damaged fully one-third.

Q. Then there were a lot of Rochester lamps and chimneys and ware of that kind; do you remember those?

A. Those were pretty well knocked up and injured quite a good deal; I don't think there was one of those lamps that could have been sold as new; they would have to go as second-hand stuff, the way things were in Nome those lamps would not bring more than 50% of the cost.

Q. Do you remember the cash register?

A. I remember the cash register; it was in the same condition as the other metal materials of all kinds, it was rusted, not so badly as the nails, but it plainly showed that it was through the moisture and was injured to some extent.

Q. To what extent was it injured?

(Testimony of H. J. Gordon.)

A. Cash registers of that sort, it was very prettily finished, and it would deteriorate one-fourth of its value anyway.

Q. (Mr. POWELL.) Who did you say those groceries were being taken up for?

A. They were being taken up for the company. It was the intention of the company to run a mess, and they were taken up to cover any possible difficulty in getting first-class supplies during the time that the company would get themselves in condition to begin operating.

Q. Now, what had injured those groceries?

A. Well, the majority of the cases I should say it was moisture.

Q. Wasn't a good deal of that canned goods?

A. Some canned goods, but it did not comprise all of it. There was various kinds of dried fruits; almost all kinds of dried fruits and sugar and flour and, if I remember, rice, beans and everything that goes to make up household supplies and, of course, there was canned goods, and those canned goods I suppose were all right; I don't know anything to the contrary, in my estimation, I am not placing any damage on the canned goods; I presume they were all right except that the labels on some of them were sloughed off and putting them on the market they

(Testimony of Captain James Carroll.)

would not have sold for the actual cost in Nome any more than here.

Q. Most of the damage to the groceries which you speak of was caused, you think, by the moisture?

A. I think so.

(Testimony of witness closed.)

Captain JAMES CARROLL, produced as a witness in behalf of libelant, being first duly cautioned and sworn, testified as follows:

Q. (Mr. BRINKER.) Give your name.

A. James Carroll.

Q. What is your business?

A. In the shipping and commission business at present.

Q. Were you ever a sea-faring man?

A. Yes.

Q. How long were you engaged in the sea-faring business? A. I was about forty-two years.

Q. Were you ever master of a vessel?

A. Yes, about thirty-one years.

Q. Steam vessel?

A. Yes, and sailing vessel.

Q. Did you ever, in your experience at sea, have a fire in your vessel?

A. No, sir, I did not.

Q. Were you ever aboard a vessel when fire broke out in the hold of a vessel?

(Testimony of Captain James Carroll.)

A. No, sir.

Q. Do you know what would be the proper method for a master to take to extinguish a fire in the hold of a vessel at sea?

A. Well, there are several methods. On board a steamship they have steam-pipes running from the boiler where you can't get at water and you turn the steam on and that smothers the fire.

Q. Now, taking a cargo such as the evidence shows this to have been, a miscellaneous cargo of groceries and wines and liquors in bottles and barrels, fine furniture, bar fixtures, piano, cash register, theater scenery, cigars and drugs and a cargo of that kind, and if the steam was turned into the hold in the event of fire, at 200 pounds pressure, for a number of hours from June 2d to something about June 4th, what would be the effect upon that cargo of that steam?

Mr. POWELL.—I object to the question as incompetent and the captain is not any more qualified to answer that question than any other witness, and it is based upon a hypothesis that is not supported by the evidence.

A. Well, I should judge it would ruin about all the cargo around in that vicinity that the steam would get at.

Q. At that pressure? A. Yes, sir.

(Testimony of Captain James Carroll.)

Q. Captain, did you know the "Santa Ana" in 1900? A. Yes, sir.

Q. Did you know what her value was in that year, in May or June or July, 1900?

A. Well, about $100,000.

Cross-examination.

Q. (Mr. POWELL.) Captain, if there should be a fire in the hold of a vessel loaded with such a cargo as counsel has described, and it should require such a steam pressure as he has indicated for such a time as he has indicated to extinguish the fire, it would be a fire of very considerable proportions, wouldn't it?

A. It might and it might not; it might be a fire down there and you could not see the fire, but you would have to have some appliance down there to put the fire out and you could not tell when it was out.

Q. If it took the steam turned on at that pressure over two days to extinguish it, it would be quite a fire? A. It should be.

Mr. POWELL.—That's all.

A. (Continuing.) Now, in reference to steam. I had steam-pipes burst in the hold where I had cargo and they damaged—for instance the flour around where the steam-pipe would burst—I hoisted

(Testimony of Captain R. C. Chilcott.)

the cargo up and the steam, especially on the flour, it would damage it.

Q. (Mr. BRINKER.) It would damage everything which the steam would come in contact with?

A. Yes, I think it would damage it much more than the water would.

(Testimony of witness closed.)

Captain R. C. CHILCOTT, produced as a witness in behalf of libelant, being first duly cautioned and sworn, testified as follows:

Q. (Mr. BRINKER.) Your name is Richard Chilcott?

A. Yes.

Q. Where do you live now? A. Seattle.

Q. What is your business now?

A. Shipping business.

Q. Were you ever a sea-faring man?

A. Yes.

Q. How long were you engaged in the sea-faring business? A. All my life.

Q. Were you ever master of a steam vessel?

A. No, sir.

Q. Did you know the steamer "Santa Ana" in May, June and July, 1900? A. Yes, sir.

Q. What was her value at that time?

A. Intrinsically she was worth $100,000. I happen to know about what she cost.

(Testimony of Captain R C. Chilcott.)

Q. For the purpose of a general average adjustment, in case of a sacrifice at sea, to save the vessel, what would you say her value would be?

Mr. POWELL.—I object to that as incompetent, irrelevant and immaterial.

A. Well, I would have to use the same figure, $100,000.

Q. Captain, do you know anything of the effect of turning steam into the hold of a vessel to extinguish fire; what effect it would have upon the cargo?

A. I would naturally assume that it would destroy anything that was perishable.

Mr. POWELL.—I move to strike out the answer of the witness and I object to the question as incompetent. I have no objection to the captain testifying to anything as an expert which falls naturally within the scope of a sea-faring man, but the captain is no more competent to testify as to the effects of steam upon goods than anyone else is.

(Testimony of witness closed.)

A. L. HAWLEY, produced as a witness in behalf of libelant, being first duly cautioned and sworn, testified as follows:

Q. (Mr. BRINKER.) You are secretary of the Seattle and Yukon Transportation Company?

A. Vice-president.

(Testimony of A. L. Hawley.)

Q. The Seattle and Yukon Transportation Company had the steamer "Santa Ana" chartered for the voyage from Seattle to Nome in May, June and July, 1900? A. Yes, sir.

Q. Have you the manifest of the voyage in May, upon which the vessel sailed, on May 26th, 1900, for Nome?

A. I have a carbon copy of the manifest that was carried by the ship.

Mr. POWELL.—I object to it because it is a copy.

Mr. BRINKER.—I offer this in evidence and will substitute a copy of it.

(Manifest received in evidence and marked Libelant's Exhibit 80B.)

Q. Mr. Hawley, do you know what the value of the steamship "Santa Ana" was in May, June and July, 1900?

A. I would not be competent to give a figure on that.

Q. Do you know what the total wholesale value of the entire cargo of the "Santa Ana" was upon her voyage beginning May 26th, 1900, from Seattle to Nome?

A. I can only give an estimate of that. I saw most of the stuff loaded on the ship, and know from the consignment generally, what it was. The value

(Testimony of A. L. Hawley.)

of that cargo, in my judgment, would be somewhere—

Mr. POWELL.—The question was whether you knew the value or not.

A. Well, no I do not.

Q. (Mr. BRINKER.) Well, I will ask you to state if you have estimated the value; what your estimate of the value is.

Mr. POWELL.—I object to that as irrelevant, immaterial and incompetent.

A. Well, I would estimate the value of the cargo at from $45,000 to $55,000.

Q. The entire cargo?

A. The entire cargo. I would like to say that that estimate is based only upon a superficial view of the cargo as it was loaded on the ship, without ever seeing any of the invoices or anything of that kind, and it is purely an estimate.

Q. I did not know but what you had some personal knowledge of the cargo by reason of your having secured insurance on it.

A. No, sir, I only secured insurance on a part of it, so that I would not know from that view.

Q. I supposed that you had effected insurance for the other shippers.

A. No, I did not.

(Testimony of John T. Campion.)

(Testimony of witness closed.)

Whereupon the further hearing is adjourned until July 21st, 1904, at 2 P. M.

July 21st, 1904, 2 P. M.

Continuation of proceedings pursuant to adjournment. All parties present as at former hearing.

JOHN T. CAMPION, produced as a witness in behalf of libelant, being first duly cautioned and sworn, testified as follows:

Q. (Mr. BRINKER.) Where do you live, Mr. Campion?

A. Seattle.

Q. What is your occupation?

A. Treasurer of the Seattle Brewing and Malting Company.

Q. Were you in Nome in June and July, 1900?

A. Yes, sir.

Q. Do you remember about the time the "Santa Ana" arrived there? A. I do.

Q. What business were you engaged in at that time?

A. We were associated with two partners and we were engaged in the mercantile and trading business.

Q. Wholesale? A. Wholesale.

Q. What line of goods did you handle generally?

(Testimony of John T. Campion.)

A. We had a varied stock of lumber, hay, feed, liquors and cigars.

Q. What was the wholesale price of lumber, finishing lumber at that time, June and July, 1900?

A. To the best of my recollection it was from one hundred and fifty to two hundred dollars a thousand.

Q. Did you handle any wine and champagne?

A. Yes, sir.

Q. I show you Libelant's Exhibit No. 68, and I will ask you to state if you know what the wholesale prices of that wine of that kind and grade was at that time, in June and July, 1900?

A. By reference to our original blotter kept at that time I can give you more accurate testimony.

Q. Have you got the book of original entry of sales made at wholesale at that time?

A. Yes, sir.

Q. You may refer to it for the purpose of refreshing your memory if you do not remember without it; the cargo of the vessel was discharged about the 3d of July, and from that time on during the month of July you may state what the wholesale price of goods of that character was.

A. I find an entry here on July 1st—some kind of wine—$75 a case.

Q. After you have refreshed your memory by ex-

(Testimony of John T. Campion.)

amining your book of original entries of sales of that kind, what would you say the wholesale value of that was at that time?

A. From $60 to $75 per case at this time.

Q. I also show you Exhibit No. 54 for a bill of goods from the combined distilleries, brandies and wines, and I will ask you to state if you handled goods of that character and what the wholesale value was in June and July, 1900.

A. We handled some articles, I cannot testify that they were just the same.

Q. What was the wholesale value of goods of that character at that time?

Mr. POWELL.—We object to that as incompetent and the witness has not shown himself competent to testify.

Q. (Mr. BRINKER.) If you can answer generally.

A. I could not do it, because it is so long ago I would have to refer to the book.

Q. You could not answer without referring to the actual sales which you made? A. Yes.

Q. If there is anything which you can find there during the month of July, I wish you would refer to it for the purpose of refreshing your memory.

(Testimony of John T. Campion.)

A. Port wine was sold at $2 a gallon; sherry at $2; brandy at $4.50 a gallon; claret in cases at $4.80. I can't find any bulk claret, and we didn't handle any reisling and I do not know what bulk claret sold for.

Q. I show you Exhibit No. 51, being for a lot of whiskies and brandies and gin, champagne and so on from the combined distilleries, and I will ask you to state, if you can, what the wholesale values of those goods were in July, 1900.

A. Whiskies were from $5 to $6 a gallon; rum and gin about $4.50 a gallon, that is for the bulk goods. The best ale and porter was selling for $7.50 a dozen; blackberry brandy $1.75; American champagne from $15 to $25, depending on the quality; vermouth $22.50 to $25 per case, but they must be different sized cases from yours.

Q. There are two kinds.

A. French and Italian. There is only a difference of twenty-five cents a case. Irish whisky from $30 to $35 a case; Scotch, the same. Hennessy brandy from $30 to $40, depending on the quality; 3 Star was $40.

Q. Well, that is 3 Star.

A. It is not marked here. Hostetter bitters, $3 a bottle—that is pretty high though—that is bulk stuff. Jamaica ginger, peppermint, creme de minthe, angastura, boonekamp, H. H. bitters, we didn't have

(Testimony of John T. Campion.)

any of it in bulk, and I could not tell you the price of it. Rock and rye, $15. I don't know anything about the rest of that stuff there.

Q. Now, I will show you Exhibit No. 53, with a lot of whiskies in barrels, and I will ask you to state what the wholesale price of that was there at that time, such as Old Crow?

A. The market price on Old Crow was about $7.50. Guggenheimer was about the same, and the other is a cheaper whisky, about $6, by the gallon.

Q. I show you an invoice of five cases of wild cherry cordial, being Exhibit No. 56.

A. I am unable to give you any estimate or any testimony in regard to that.

Q. I show you Exhibit No. 23, for one hundred barrels of beer in bottles, and I will ask you to state if you handled beer of that grade and if so, what was the wholesale price.

A. From $25 to $30, a cask of six dozen bottles.

Q. When you use the work "cask" you mean a barrel? A. Yes.

Q. You handled cigars? A. Yes.

Q. I show you Exhibit No. 45, for a bill of cigars and I will ask you whether you know the wholesale price of those at that time, or goods of that kind?

A. I am not familiar with this grade of cigars at all, but similar cigars that were sold ranged from

(Testimony of John T. Campion.)

$125 to $150 per thousand for the first item appearing here, Cavalleros Perfectos would be $25 to $30 a thousand more.

Q. I show you Exhibit No. 55, for another bill of cigars and I will ask you to state if you know what the wholesale value of those was.

A. The only way I can judge of those is by the wholesale cost shown on the invoice. The probable value at that time would be $110 for the Standard Club size and $100 for the same cigar in larger quantities. It is just simply a difference in price based on the different sized packages.

Q. Did you handle any playing-cards at wholesale? A. Yes.

Q. I will ask you to state, if you can, what the wholesale of those on Exhibit No. 48 was?

A. Fifty dollars a gross.

Q. That is twelve dozen?

A. Twelve dozen.

Q. Did you handle any bar fixtures, back mirrors and front bar and things of that kind?

A. We had two sets of bar fixtures there; I do not know that compare them with any other set so as to be able to testify intelligently in regard to the bar fixtures or not.

Q. If they were an average Brunswick-Balk bar fixture, 30 foot long, what would be the wholesale

(Testimony of John T. Campion.)

price there in excess, if you can state, of the purchase price in Chicago.

Mr. POWELL.—I object to that as irrelevant, immaterial and incompetent.

A. They ought to get 60 or 75% advance anyway.

Q. (Mr. BRINKER.) Did you handle any pianos?

A. We had a couple of pianos, but they were not sold until late in the fall, considerably later than this.

Q. Do you know what pianos were selling for along about June and July, 1900?

A. About 100% advance over what they cost.

Q. Did you handle any builders' hardware, such as hinges, locks and nails?

A. Nothing only what we used ourselves.

Q. Did you handle any groceries?

A. Nothing only our own commissary supplies for our mess.

Q. Did you handle any tents or canvas at wholesale?

A. We made two or three tents of our own that we used, but I could not tell you the value of them.

Q. You did not sell them?

A. We sold them later on, I forget what they brought.

(Testimony of John T. Campion.)

Q. Did you handle any carpets?

A. Nothing of that kind.

Q. Did you handle any carpenter's tools?

A. No, sir.

Q. Did you have any cash registers?

A. Yes, we had half a dozen.

Q. What was the wholesale price of cash registers there in excess, if you know, of the cost price outside, if any?

A. We sold for 100% advance over what we paid for them.

Q. Did you handle any furniture or bedding or mattresses in stock?

A. A lot of beds, clothes and bed quilts that were sold there.

Q. How did they sell compared with the cost outside?

(Objected to as irrelevant, immaterial and incompetent.)

A. We had considerable difficulty in getting rid of them, but we sold them at an advance. I forget what we did get for them.

Q. Did you handle any mattresses?

A. No, sir.

Q. Nor blankets? A. No, sir.

Q. No furniture? A. No furniture.

(Testimony of John T. Campion.)

Q. Neither office furniture or chairs or desks?

A. No, sir, nothing of the kind.

Q. Did you handle Guinness' ale and porter?

A. Yes.

Q. How did that sell compared with the cost outside, in bottles?

A. It sold for $4.80 a dozen.

Q. How did that compare with the cost outside?

A. I don't recall what the cost of that is.

Q. One of them is marked $14.00, that means per case? A. $14.00 a barrel.

Q. Did you handle any electrical appliances such as enunciators and call bells. A. I did not.

Q. Did I ask you about the bar glassware, whether you handled it? A. We did not.

Q. Did you handle empty whiskey flasks wholesale? A. We had some of them.

Q. How did they sell wholesale as compared with the cost outside? A. I could not tell you.

Q. You did not handle any dice did you, or faro checks. A. No.

Q. Or any gambling appliances, outside of playing-cards? A. That was all.

Q. Did you handle any Rochester lamps?

A. We had a number of those lamps and sold them afterwards, but I cannot tell you what we got for them.

(Testimony of John T. Campion.)

Q. You do not remember what their regular, current, wholesale value was? A. I do not.

Q. Any gold skin scales and appliances, did you handle them?

A. We had gold scales, but we didn't buy and sell them at that time.

Cross-examination.

Q. (By Mr. POWELL.) Was there any difference in the price of lumber according to its grade; that is, does finishing lumber sell any higher than rough lumber? A. Yes.

Q. What is the difference in price between the finishing lumber and rough lumber?

A. About $100 a thousand.

Q. Ordinary rough lumber, what was that worth wholesale?

A. It was quoted down to $100 a thousand. When I first landed I was offered $225.00 and then that was in the early part of June, and the market kept breaking and changing all through.

Q. How low did it finally get?

A. I think that $100 was the minimum price.

Q. Is it not a fact that the market broke in everything at Nome, in the summer of 1900?

A. Yes, it broke in everything there from time to time; the prices that I have quoted are what we were getting and selling for right along.

(Testimony of John T. Campion.)

Q. July?

A. Yes, in the early part of July, and the latter part of June.

Q. Exhibit No. 68, which you were shown, has 30 cases of Pommery, that is champagne?

A. Yes.

Q. In pints? A. Yes, sir.

Q. Did you handle that class of goods there?

A. I did.

Q. How long was it before the market in liquors began to break?

A. The breaks were temporary, and were caused by the dumping of small stocks on the market, and they would re-establish themselves from time to time. Beer maintained the price that I have named practically all through the season; it started out at a higher figure before those goods arrived—it started out at $35.00 a case.

Q. There were times in the summer of 1900, when you could buy liquors as cheap in Nome, as in Seattle?

A. I think some people bought liquors pretty cheap, although we never sold any as cheap as that.

Q. That is, there was no sustained, definite market price of commodities in Nome for any great length of time during this summer; that is to say, they would go up and down and fluctuate from day

(Testimony of John T. Campion.)

to day according as "they came in" and brought in an excess of stock on some line?

A. We had prices which we undertook to hold to, and very seldom would meet that competition of that kind, although there were stocks, similar to these, that people were forced to sell, and which would bread the market for a few hours, or for a day; they would go out and peddle against us for a less figure then we were selling for, although we undertook to maintain all through the year the prices that I have quoted, or about those prices.

Q. How long did you have to hold your stock before you could dispose of it?

A. We carried it over—a whole lot of our bulk whisky—to the following year.

Q. As a matter of fact, there was so much whisky and liquors brought into Nome during the summer of 1900, that the large wholesale houses, as a rule, held their stock over until the summer was over, didn't they?

A. In my opinion there was very few of them that undertook to cut the price below those named by me, but still I presume some of them did that.

Q. But, as the result of that, these wholesale houses had to hold their stocks over?

A. A good part of it.

(Testimony of John T. Campion.)

Q. Who kept the books which you have just been testifying from, Mr. Campion?

A. Part of them were kept by Mr. Myer, a partner of mine, and part by an employee, and part by myself.

Q. That was your book of original entry?

A. Yes, a regular daily blotter.

Q. You testified that the price of port wine up there was $2.00 a gallon, and sherry $2.00 a gallon. Now, there are several kinds of port wine are there not? A. Yes.

Q. And several kinds of sherry? A. Yes.

Q. Are they all the same price?

A. No, sir, not by any means.

Q. Well, can you tell whether or not the port and sherry that were shown to you upon Exhibit No. 54, were that price.

A. No, sir, I have no idea as to the quality of wine referred to in this invoice except by the cost of it.

Q. You say that there was brandy sold at $4.50 a gallon—well, there are various kinds of brandy?

A. Yes.

Q. By that you mean Hennessy's?

A. No, sir, Hennessy's is all case brandy. This is bulk brandy.

Q. What kind of brandy was it which you had that was $4.50 a gallon?

(Testimony of John T. Campion.)

A. I presume this was the imported brandy.

Q. You had claret in cases at $4.80 a gallon; now there are a great many brands of claret?

A. Yes.

Q. Varying in prices? A. Yes.

Q. What brand was it you had in mind when you said it was worth $4.80 a gallon?

A. I testified about that $4.80—the claret that I referred to should have been $18.00 a case, that is Cresta Blanca, Sauterne, but there is a cheaper claret than that a good deal. The Zinfandel, $8.00 a case, that is a cheaper claret.

Q. So that it is impossible to say what the price of claret was in June, or the value of claret in general?

A. It would depend entirely on the kind and quality.

Q. And that is true with whiskies too?

A. Yes, sir.

Q. And I presume of blackberry brandy; are there different brands of that?

A. I don't think so—still I presume there are different grades of it.

Q. Vermouth you say is worth $22.50 to $25.00 per case. Now, are there not various brands of Vermouth?

(Testimony of John T. Campion.)

A. There is only one standard of the two kinds—are various grades—however, the dealers won't handle but practically one class.

Q. Irish whisky and Scotch whisky, you say were worth from $20.00 to $25.00 a case; is all Irish whisky the same grade?

A. Very little difference in price; they don't vary over a dollar to a case.

Q. Is that true of the Scotch? A. Yes, sir.

Q. Did you deal in Old Crow whisky and Guggenheimer? A. Yes, sir.

Q. How much of that Old Crow did you have on hand in July, do you remember?

A. About five barrels of Old Crow.

Q. How much of that did you succeed in selling off during the summer at the price that you have given?

A. I think we sold all the Old Crow the first summer.

Q. How late in the summer before you got rid of it? A. Up to the fall we had it.

Q. How about the Guggenheimer, is the same true of it?

A. That was the best quality of rye whisky and that sold well.

Q. What was the Lacey's Sour Mash?

A. I haven't the slightest idea what it is.

(Testimony of John T. Campion.)

Q. You did not deal in those cigars that you testified about; you were simply testifying about some cigars which you thought were about the same grade? A. Based on the invoice value.

Q. By that you mean, you made an estimate of what the percentage of advance would be at the outside prices?

A. Yes, sir. We bought goods similar to these at prices very similar and sold at the prices I have given.

Q. You were asked about the Brunswick-Balke-Collender bar fixtures; they make all kinds of bar fixtures? A. Yes.

Q. It is impossible to speak of an average Brunswick-Balke-Collender bar fixture, as I understand it, correctly?

A. My reply to that question of Judge Brinker was based on the knowledge of the selling value of fixtures that is manufactured by another concern. We had two sets of such fixtures, and while they were not Brunswick-Balke fixtures, we could have sold them at a hundred per cent advance on their cost.

Q. Did you see the cargo of the Standard Theater Company at Nome, when it was unloaded?

A. I don't think so.

(Testimony of John T. Campion.)

Redirect Examination.

Q. (Mr. BRINKER.) Did you handle any sheet stoves?

A. No; except for our own use. We had stoves of our own.

Q. You say the lumber ran from $150 to $200 per M in July, according to grades?

A. I can give you more reliable testimony—I am speaking from memory regarding the lumber—to the best of my recollection that is about right.

Q. I show you Exhibit No. 75, and I will ask you to look at the kind of lumber that is embraced in that and state if that falls within the prices that you have given.

A. Yes, I think that was probably the highest priced lumber that was on the market in those days.

Q. Exhibits Nos. 73 and 74 were something of a similar kind?

A. I should judge that this was all undressed lumber and it would come under the head of the cheaper grades; it seems to be dimension stuff.

Q. Now, did you handle any windows and window sash in stock?

A. Nothink except what we used for our own buildings.

Q. Did you handle any doors in stock?

A. No, sir.

(Testimony of John T. Campion.)

Q. Did I ask you about mineral water?

A. I think not.

Q. Well, I show you Exhibit No. 41, being for 10 cases of mineral water, and I will ask you what the wholesale prices of that were at that time?

A. We did not handle water of this particular character; a similar brand sold for $15.00 a case.

Q. Now did you handle any sewer pipe or piling?

A. No.

Q. Did you handle any galvanized iron or corrugated iron? A. No, sir.

(Testimony of witness closed.)

Whereupon further proceedings were adjourned until July 22d, at 10 A. M.

July 22d, 1904, 10 A. M.

Continuation of proceedings pursuant to adjournment. All parties present as at former hearing.

W. A. MALLOY, recalled for further

Direct Examination.

Q. (Mr. BRINKER.) You testified when you were on the stand before that when the "Santa Ana" was about 700 miles off Flattery on her voyage to Nome in June, 1900, that fire broke out in the hold of the vessel, didn't you?

A. Yes, sir.

(Testimony of W. A. Malloy.)

Q. Do you know what caused that fire?

A. No, sir.

Q. How long did it continue burning?

A. Well, it started I think on June 2d, and it was put out somewhere along in June 4th.

Q. What efforts were made to extingiush the fire?

A. Well, there was water put in the hold and steam—salt water I supposed, and steam, and the captain stated in my presence that he put in two hundred pounds pressure to the square inch.

Q. Of steam? A. Steam.

Q. How long did that continue?

A. Well, on the 2d of June, I think, that continued something like six or eight hours.

Q. And then what was done?

A. Then they opened the hatch and they put the hatch back again and forced in the steam probably six hours more; I think that was on the third, and then on the fourth they forced in steam again, probably for five or six hours. They also put in salt water in the bottom of the boat, probably two or three feet of salt water.

Q. Under whose direction was that effort to extinguish the fire conducted?

A. Captain Strand.

Q. He was captain of the vessel?

A. Yes, sir.

(Testimony of W. A. Malloy.)

Q. Were the hatches opened on the fourth?

A. Yes, I think they were; they were opened on the fourth.

Q. And what condition was the fire in then when they opened them on the fourth?

A. The fire was supposed to be out; they took out some of the boxes and case goods, wines mostly, and a lot of baggage and different other articles of goods, and brought them up on the deck.

Q. Did you go down in the hold after the fire was extinguished? A. Yes.

Q. Was there any injury to the vessel caused by the fire?

A. There was some; it seemed as though one of the ribs or the side of it was charred somewhat.

Q. How about the deck beams on which the deck rested?

A. I think one or two of them was charred.

Q. What was done with the portion of the cargo that was taken out of the hold after the fire was extinguished?

A. Well, they took out quite a lot of baggage and case goods and different other goods and set them up on the deck, and they seemed to want to locate where the fire originated, and they did locate it to a certain extent; it seemed to be among the case goods.

Q. Case goods? A. Yes, sir.

(Testimony of W. A. Malloy.)

Q. In what parts of the hold of the vessel?

A. In the front part.

A. In the forward hold.

A. In the forward hold.

Q. Were there any of the goods that were taken out of the vessel thrown overboard? A. Yes.

Q. How much of them, do you know?

A. Well, I could not exactly state. There was some case goods; a lot of bottles and cases, probably ten cases.

Q. Then you proceeded to what point?

A. We proceeded to Dutch Harbor; that is to Cape Nome, but we stopped at Dutch Harbor.

Q. How long were you at Dutch Harbor?

A. About two days.

Q. Was the cargo in the hold overhauled while you were in Dutch Harbor and discharged, any of it?

A. No, sir.

Q. Then you went from there to where?

A. Cape Nome.

Q. What day did you arrive in Cape Nome?

A. I think the 18th of June.

Q. Were you permitted to land at that time?

A. No, sir.

Q. What was done with the vessel and the passengers and the cargo at that time?

(Testimony of W. A. Malloy.)

A. Well, there was smallpox discovered and we were ordered to quarantine at Egg Harbor, 118 miles from Cape Nome.

Q. Was there any of the cargo discharged before you went to quarantine? A. No, sir.

Q. How long did you remain in quarantine?

A. Ten days.

Q. Then where did you go?

A. Back to Cape Nome.

Q. When you returned to Cape Nome what was done?

A. We arrived there on the 28th and commenced discharging cargo.

Q. How long did it take you to discharge the cargo?

A. I think about five days, from the 28th until about the 3d of July or the 4th of July.

Q. Did you see the cargo of the vessel after it was discharged and taken ashore?

A. Yes, sir.

Q. Where was it put?

A. On the beach and then transferred up into the warehouses.

Q. The warehouses of whom?

A. Of the Seattle and Yukon Transportation Company.

(Testimony of W. A. Malloy.)

Q. Who were the Seattle and Yukon Transportation Company.

A. Mr. Woods and Mr. Hawley, I don't know the rest of them.

Q. I mean did they have charge of the vessel?

A. Mr. Woods was there at the time when the cargo was landed; he went on the "San Blas" ahead of the "Santa Ana," and arrived there ahead of us.

Q. Did you see the cargo of the Standard Theater Company after it was landed and placed in the warehouses of the Seattle and Yukon Transportation Company? A. Yes, sir.

Q. In what condition was it?

A. It was in very bad condition.

Q. Caused by what?

A. Caused by steam, heat and water and some fire.

Q. How extensive had the fire been in the cargo?

A. Well, the fire was discovered among some of the case goods; it was not very extensive—the fire was not.

Q. What did the principal damage to the cargo appear to be caused by?

A. Steam, heat and water.

Q. Did you see the cargo when it went aboard the vessel in Seattle? A. Yes, sir.

Q. Do you know the value of the entire cargo aboard the "Santa Ana" on that voyage?

(Testimony of W. A. Malloy.)

A. Well, I could make a guess—I should judge in the neighborhood of ninety to one hundred thousand dollars.

Q. The value of what? A. The entire cargo.

Q. What was the value of the cargo belonging to the Standard Theater Company in Seattle?

A. About $35,000.

Q. What was the wholesale value of the cargo of the Standard Theater Company if it had been landed at Nome in good order?

Mr. POWELL.—I object to that as incompetent and the witness has not shown himself competent to testify.

A. Oh, about twice or three times that value.

Q. According to the prices that then prevailed at Nome? A. Yes.

Q. What was the purpose of the Standard Theater Company in shipping this cargo to Nome?

A. Well, we were to go into the retail business there. To put up this big theater building and had everything complete for it; had goods on the "Santa Ana" and the "Brunswick" and the "City of Grand Rapids"; the "City of Grand Rapids" was abandoned afterwards.

Q. Abandoned here in Seattle?

A. Yes. We had invested between $80,000 and $90,000 to carry on the retail business there.

(Testimony of W. A. Malloy.)

Q. The cargo on the "Brunswick" arrived there?

A. Yes.

Q. And the cargo on the "Santa Ana"?

A. Yes.

Q. In the condition which you stated?

A. Yes.

Q. Was not the cargo on the "Grand Rapids" also shipped there?

A. Well, we could not get all the cargo aboard the 'he" Grand Rapids." We were trying to get our goods on one of the A. C. Company's boats and everything was taken up and so we had to abandon the "City of "Grand Rapids." We were trying to get our goods "Brunswick" and the steamship "Santa Ana." The last night we delayed quite a while in securing transportation.

Q. After you to got to Nome why didn't you set up your business and go on as you had originally intended?

A. Well, it was on account of the condition of the goods; they were all ruined and destroyed and we had to abandon that idea.

Q. That is the goods that were aboard the "Santa Ana." A. Yes.

Q. If you had put the goods in buildings at Nome in the condition in which they were landed from the "Santa Ana" at Nome for the purpose of wholesal-

(Testimony of W. A. Malloy.)

ing them out, what would have been the value of the cargo as it was landed, with reference to its value if it had arrived there in good condition?

Mr. POWELL.—I object to that as incompetent and the witness has not shown himself competent to testify.

A. It would have been 100% over the Seattle prices.

Q. No—I mean in the condition in which it arrived, what would have been the value of the cargo if you had set it up and undertaken to have sold it, with reference to its value if it had been sound?

(Respondent interposes the same objection.)

A. Oh, it would not have been worth one-quarter of its value—just about one-quarter of its value.

Q. Then what would you say that the total damage to the entire cargo of the Standard Theater Company aboard the "Santa Ana" was, caused by fire and the efforts to put out the fire which you have spoken of?

A. The entire damage?

Q. Yes.

A. Well, I should say about 75%.

Q. Seventy-five per cent of the total value?

A. Yes, sir.

Q. Now, what did you do with the cargo after you got it, after it was landed and placed in the ware-

(Testimony of W. A. Malloy.)

houses of the Seattle and Yukon Transportation Company?

A. After it was landed there, Mr. Woods came to me and told me that there was a surveyor there who represented the Marine Underwriters of San Francisco who would adjust this matter and make a survey of the goods.

Q. For what purpose, did you understand?

A. To see what damage was done.

Q. In whose behalf was this surveyor of the Marine Underwriters acting, as you understood?

A. Well, the insurance companies of San Francisco.

Q. Did the Standard Theater Company have any insurance on its cargo? A. Yes.

Q. Do you remember the amount of the insurance? A. I think $15,000.

Q. Did you have any dealings with this adjuster or surveyor of the Board of Marine Surveyors of San Francisco? A. Yes.

Q. What was it?

A. Mr. Gollin was making a survey of a lot of other goods there, and I was anxious to have a survey of my goods hurried up after Mr. Woods told me that Mr. Gollin would make the survey, and I thought on account of the time—it was over thirty

(Testimony of W. A. Malloy.)

days then—and I thought I had to get this in in sixty days' time.

Q. Thirty days from what?

A. From the time we left here.

Q. Do you mean from the time the fire broke out?

A. When he made the survey it was over thirty days and going close to forty days from the time we left Seattle.

Q. From the time of the fire, how long had it been?

A. It was about, I think, five or six days, probably a week after, before he could make the survey.

Q. You misunderstood me—the fire occurred on the 2d to the 4th of June? A. Yes.

Q. Now, it was about the 3d or 5th or 6th of July, when he made the survey?

A. It was along about the 6th or 7th of July.

Q. Then it was more than thirty days after the fire occurred? A. Yes.

Q. Then you started to say that you wanted him to hurry up and make the survey?

A. I thought we had to get our report in here—some of the policies called for getting the report in inside of sixty days.

Q. That was the proof of loss?

A. Yes, the proof of loss.

Q. Did you have your policies with you?

(Testimony of W. A. Malloy.)

A. No, sir, and I told Mr. Gollin to hurry it up and I would give him a one hundred dollar bill, and I paid Mr. Gollin $100.

Q. For the purpose of getting him to hurry up the survey? A. Yes.

Q. What, if any, effort did you make to abandon the cargo to the insurance company?

Mr. POWELL.—I object to that as irrelevant, immaterial and incompetent.

A. I told Mr. Gollin when he went to make the survey that if he wanted to take over the cargo that I was willing to abandon it if he would allow, or stand for the $15,000 insurance—if he would stand for that amount we would abandon the cargo. He said no, he would not—that he could not do it.

Q. He could not do it? A. No.

Q. Now, then, after that and before this survey, was that cargo moved from the warehouses of the Seattle and Yukon Transportation Company, and if so, to where?

A. It was moved from the Seattle and Yukon Transportation Company's warehouses to the Standard Theater Company's warehouse, or showhouse. We had a big tent up there where we put all the goods in. We had the tent that we took in there and put it up temporarily and we had already put the goods in, and the survey was made there.

(Testimony of W. A. Malloy.)

Q. How did you happen to move them up there?

A. Well, I had them brought up there. I went to Mr. Woods and I asked Mr. Woods if it would interfere with the insurance any if we would have the goods brought up to the tent—they were all thrown up in the warehouse like a lot of old junk, in bad shape, and hard to get at and I said, "There is a big room up there and we can separate it and survey it to better advantage," and he said, "No, you won't lose your rights," and Mr. Gollin said the same thing, and Mr. Gollin was there at the time, and we had them moved up there and the survey made there.

Q. Was there anything said by you or by the master of the vessel and Mr. Woods and Mr. Gollin, or anyone else in your presence, representing the Standard Theater Company of the ship, about a general average adjustment?

A. No, sir. I never heard of it.

Q. Were there any general average bonds taken, or demanded by the master of the ship or by Mr. Woods or by the Seattle and Yukon Transportation Company for any of this cargo before it was delivered? A. No, sir, none whatever.

Q. Did you ever hear of anything of the kind?

A. No, sir.

Q. Now, after you got the cargo up there in the

(Testimony of W. A. Malloy.)

Standard Theater Company's warehouses, then you say Mr. Gollin made the survey? A. Yes, sir.

Q. What kind of a survey did he make as to thoroughness?

A. Not a very satisfactory one. As I said before he came there about ten o'clock in the forenoon and got away about three in the afternoon, and he came there three different times, I think, and would pass on a case of goods, a barrel of goods, a box of goods and different other kinds of packages—"Damage 10%—15—20—30," and so forth.

Q. What examination did he make to arrive at that amount of damage?

A. Well, he just made a guess at them—just boxes and barrels piled up and he just made a guess at them.

Q. From the exterior? A. Yes, sir.

Q. Would he open them?

A. There was a few cases opened afterwards.

Q. I mean while he was making his examination.

A. No, sir, he would not open them right then; the goods that he passed on as damaged 10% we opened up afterwards and found them damaged 100%, and I called him in afterwards and showed him how they were damaged.

Q. What particular goods do you have reference to now?

(Testimony of W. A. Malloy.)

A. Well, such as wines—in fact all case goods.

Q. All case goods—what do you mean by case goods?

A. I mean port wine, sherry wine, champagne, claret; all kinds of goods like that.

Q. You are speaking generally of goods in bottles and packed in cases? A. Yes.

Q. Then, after he had completed his examination, what did you do? A. I started in.

Q. I will ask you first as to whether you accepted his examination and report as satisfactory, or otherwise.

A. No, sir, I did not accept it; I made another survey; then I called in Mr. Harry Gordon and another gentleman.

Q. What was his name—was it Slater?

A. George Slater and Peterson.

Q. Where is Slater?

A. Slater is up in the Candle Creek country near the Arctic Ocean; that was where he was the last I heard of him.

Q. And you said that Harry Gordon and F. H. Peterson are here and have testified in this case?

A. Yes.

Q. Now, just state what you and Harry Gordon and Peterson did in examining this cargo.

(Testimony of W. A. Malloy.)

A. Well, we went into the whole of it—into the whole thing, and had to unpack everything—very near everything—and examined everything thoroughly, and then we started in peddling out the stuff as best we could—we had five other men working on a commission, and we peddled it out as best we could on a percentage.

Q. How long a time were you engaged in peddling it out?

A. July and August, I think up until about the 15th of September—about two months and a half.

Q. How much—what was the total amount which you realized from the sale of the cargo, peddling it out as you did?

(Objected to as irrelevant, immaterial and incompetent.)

A. About $21,000.

Q. That was the gross amount?

A. Yes, sir.

Q. What were your expenses during that time connected with the sale of the cargo?

(Same objection.)

A. About $6,000.

Q. Now, to go into the particulars, Mr. Malloy, in the cargo there were four barrels of Guinness White Label ale; now, what condition was that in when it was landed at Nome?

(Testimony of W. A. Malloy.)

A. Well, there was some of that; the bottles were cracked—some of the bottles half full and some three-quarters full—the majority of them was in good shape.

Q. What was that damage caused by as it appeared to you?

A. I should judge steam and heat.

Q. To what extent then were those four barrels of White Label Guinness ale damaged?

A. Twenty-five per cent.

Q. Twenty-five per cent of their value?

A. Yes.

Q. Then there were two barrels of porter in bottles; what condition was that porter in?

A. About the same—25% damage.

Q. That was damaged 25%?

A. Twenty-five per cent.

Q. Then there was one keg, five gallons, of Jamaica Ginger; do you remember of examining it?

A. Yes.

Q. What condition was that in?

A. That had run out through the bung on each side of the little keg and there was probably one-third of it ran out of the five gallon keg.

Q. And what was the condition of the balance of it?

(Testimony of W. A. Malloy.)

A. Well, I don't know—it didn't just taste right—I tasted all those goods and it didn't taste just like Jamaica Ginger should.

Q. What would you say that keg was damaged?

A. Fifty per cent.

Q. Then there was a five gallon keg of peppermint; what condition was that in?

A. The same condition; damaged 50%.

Q. Then there was a ten gallon keg of absinthe.

A. The same condition.

Q. To what extent was the damage?

A. Fifty per cent.

Q. There was a ten gallon keg of Benedictine; what condition was that in?

A. About the same; damaged about the same, 50%.

Q. And there was a ten gallon keg of vermouth.

A. The damage was the same, 50%.

Q. And then there was a ten gallon keg of Creme de Mint.

A. Damaged the same, 50%.

Q. And a five gallon keg of Angostura Bitters.

A. Just the same.

Q. And a five gallon keg of Bonacamp Bitters.

A. Damaged the same.

Q. A five gallon keg of H. H. Bitters.

A. Damaged the same.

(Testimony of W. A. Malloy.)

Q. There was ten barrels of Old Pepper Whisky; did you examine it? A. Yes.

Q. What condition was that in?

A. Well, that had run out of each side of the bung and run down the barrel; there must have been ten or twelve gallons short in each barrel, I should judge. We measured it with the rule run down in the bung, and according to the gauger's list it must have lost at least ten or twelve gallons.

Q. To what extent would you say that was damaged? A. About 35%.

Q. Then there was one barrel of imported gin; did you examine that? A. Yes.

Q. What condition was it in?

A. About the same—damaged thirty per cent.

Q. Then there was a barrel of Jamaica rum.

A. About the same, 30% damage.

Q. Then there was a cask of Cognac brandy?

A. The same, about 30%.

Q. Then there was four barrels of Scotch whisky.

A. The same.

Q. And one barrel of blackberry brandy.

A. The same.

Q. And one barrel of Rock candy syrup.

A. That was damaged the same.

Q. Then there was one cask of De Konpy gin.

A. About the same.

(Testimony of W. A. Malloy.)

Q. Now, there was a lot of furniture, bedding, mattresses, bed springs, chairs and so forth; what condition did they arrive in?

A. They arrived in very bad condition.

Q. How were they damaged, if damaged at all?

A. Steam and heat and water.

Q. And to what extent were they damaged?

A. About 60%.

Q. Now, describe any of them as to the particular condition they were in, for instance take the mattresses, how did they appear?

A. Well, they were all soaked with steam and water and swelled up, in very bad shape, and the same with the springs, all rusted and twisted out of shape.

Q. And how about the blankets and bedding?

A. About the same; the steam heat went all through them, and some of the color ran in the quilts.

Q. And the chairs?

A. Well, the varnish all peeled off and they were in bad shape.

Q. Now, there was a cash register in the cargo; do you remember the condition it arrived in?

A. Yes, sir.

Q. What condition was that?

A. Well, there was steam penetrated all through it; steam and heat and it rusted all the keys and

(Testimony of W. A. Malloy.)

everything, and it all stuck together, in bad condition.

Q. Is that a piece of delicate machinery?

A. Yes, sir.

Q. To what extent was that damaged?

A. About 50%.

Q. Then there were eight cases of Rochester lamps, did you examine them?

A. Yes, sir. They were in about the same condition; damaged about 50%. The steam and heat went all through them and rusted and tarnished them.

Q. And the lamp chimneys.

A. Some of them were broken; it seemed as though when they got to the air, some of them went into hundreds of little fine pieces.

Q. Then there were eight cases and ten barrels of bar glassware and furnishings, what condition did they arrive in?

A. That was in about the same condition; damages 60%. The seltzer bottles and lots of that stuff after we put it up on the stand there—three large seltzer machines that cost ten and fifteen dollars apiece, they went into millions of pieces as soon as they came in the air, and a lot of the glassware the same way—it had the same effect.

Q. Then there were 22 packages of groceries; what condition did they arrive in?

(Testimony of W. A. Malloy.)

A. Very bad condition, put aside of some of the canned goods which were all right, they were damaged 65%.

Q. Then there was a combination stove.

A. That was all rusted—it looked damaged 70%.

Q. Then there was a chuck-a-luck tub.

A. That fell all apart; the broadcloth on it was ruined; that was damaged 100%.

Q. That was ruined? A. Yes.

Q. Then there was a suit wheel; what condition was that in?

A. Well, the steam and heat got into it and cracked the glass some; some of the colored cards in there had run the color and damaged it probably 75%.

Q. Then there was a roll-top desk; what condition did that arrive in?

A. That all came apart; that is the most of it peeled up and there was big blisters all over it, done by steam and heat—damaged 80%.

Q. Then there were two sets of gold scales and appliances; do you remember those?

A. Yes, sir.

Q. What condition did they come ashore in?

A. They were all tarnished and rusted; damaged 75%.

(Testimony of W. A Malloy.)

Q. Now, there were three separate consignments of champagne; there was one of 75 cases, do you remember that? A. Yes, sir.

Q. What condition was that in?

A. That was a total loss, 100%.

Q. Just describe the condition that champagne was in.

A. Well, as I said before, a lot of the bottles were empty. There was no crack in the bottles or nothing, and the wine must have gone out of the corks; while the other bottles there would be an inch of wine or a quarter full or half full or three-quarters full—very few of them were full bottles.

Q. Well, now, those that were full, did you taste any of it to see what condition it was in?

A. Yes.

Q. What condition?

A. Very bad—it tasted like sour vinegar somewhat.

Q. Was it marketable at all in its condition?

A. No, sir.

Q. Then there was another consignment of 25 cases of champagne, what was the condition of that?

A. That was about in the same condition.

Q. And damaged to what extent?

A. The same extent.

(Testimony of W. A. Malloy.)

Q. Then there was another consignment of 25 cases of Pommery and Greno; what condition was that in? A. It was about the same.

Q. Then there was a lot of stationery and blank books?

A. Yes, a lot of stationery and blank books and stuff in the consignment from Lowman & Hanford's, the steam and heat got into it and swelled it up and it was in bad shape; some of it was good—it was damaged 75%.

Q. Then there were a lot of stage settings, do you remember those? A. Yes.

Q. What condition were they in?

A. They were all rusted, the steam had twisted some of them out of shape.

Q. There were 100 barrels of beer; is that the same beer which is mentioned in the invoice from the Seattle Brewing & Malting Company?

A. Yes, sir.

Q. What condition was that in when it arrived?

A. That was in very fair condition, that is to say, as I examined it, probably ten or twelve barrels, I found some of the bottles cracked and some of the beer had got out of it, done by steam and heat—probably 25% damage on the 100 barrels.

Q. Then there were several lots of builders' hardware and so on?

(Testimony of W. A. Malloy.)

A. I think there was five lots of hardware all told. As I stated in my former testimoy, the first lot was damaged 40%; the steam and heat got into it and rusted it all and some of it was twisted out of shape and some of it was all right—damaged 40% the first lot. The next lot was damaged 25%; it was in a little better condition than the first. The next lot was damaged 40%; the next lot 25 and the next lot 40.

Q. There was a lot of carpenter's tools; did you take those into consideration in detailing the damage to the hardware?

A. That I think includes it—if that was all rusted and the steam and heat had rusted it and it had to be scraped and worked at—they were second-hand tools.

Q. In this hardware were there door locks and hinges?

A. Yes, all the building material, the steam heat went into it and rusted it up; some of the locks you could not use at all—you could not turn the keys—the locks got it harder than anything else—such stuff as that. Of course there was other hardware that could be used.

Q. Now, there were 60,000 cigars in one consignment and 10,000 in another; did you examine them?

A. Yes, sir.

Q. What condition were they in?

A. They seemed to be in very bad condition.

(Testimony of W. A. Malloy.)

Q. What appeared to have brought about that condition? A. Steam and heat.

Q. Just describe the condition they were in when you opened them up.

A. When we opened them up and they struck the air they swelled up like a cabbage and bust. There were several boxes of them, in fact there was a good many thousands of them were just that way; as soon as they struck the air they went to pieces; it seemed as though the heat and steam took the stamps off the boxes and the lids was kind of cracked and they were in pretty bad shop—damage on the total lot about 65%.

Q. Now, there were 12,700 checks—what are they —poker checks?

A. Different kinds, for the side games and all kinds of games.

Q. What condition were they in?

A. They were a total loss—the steam and heat stuck them together.

Q. Is that true of the dice; there were several invoices of dice.

A. That was all about the same, a hundred per cent damage.

Q. Entirely ruined? A. Entirely ruined.

Q. Then there were 14 gambling tables; do you remember the condition?

(Testimony of W. A. Malloy.)

A. Yes; the steam heat got into them and damaged it very badly—the damage on them would be probably 60%.

Q. There were 12 barrels of imported ginger ale; what condition was that in?

A. That was damaged just about the same as the beer, 25%; I opened some of them and found some, as I said, cracked, and some of the ginger ale had run out—damage 25%.

Q. There was 28 cases of bar fixtures and things of that kind that go to make up the bar; did you examine those when they came ashore?

A. Yes.

Q. What condition were they in?

A. They were damaged very badly, a total loss, 100%. The steam heat just warped them and tore the veneer off them and tore them all to pieces.

Q. Then there was a piano, what condition was that in?

A. About the same, 100%; it was all damaged by steam and heat.

Q. Did you afterwards do anything with the piano and those bar fixtures? A. Yes, sir.

Q. Did you have any work done on them?

A. Yes, sir.

Q. Who did you employ to work on them?

A. Mr. Peterson.

(Testimony of W. A. Malloy.)

Q. What was he?

A. He was a cabinet-maker that worked for us five or six years and we took him north on the steamship "Santa Ana" with us.

Q. What was your purpose in putting him to work on the bar fixtures and piano?

A. In order to try and dispose of them and get what we could for them.

Q. Do you remember how long he worked on those bar fixtures and piano for you?

A. I don't remember the number of hours; I think that I paid the two men $1 an hour each and himself $2 an hour, and that amounted to $512.

Q. Did you dispose of the bar fixtures and piano after Peterson got through with them?

A. Yes, sir.

Q. Do you remember what you got for them?

A. Yes.

(Objected to as irrelevant, immaterial and incompetent.)

Mr. BRINKER.—In view of the witness' testimony, I will withdraw that question.

Q. Now, there were three rolls of scenery; what scenery was that?

A. That was the scenery for the stage.

Q. What condition did that come ashore in?

(Testimony of W. A. Malloy.)

A. Very bad; the colors were all run and it stuck together.

Q. To what extent was that damaged?

A. One hundred per cent.

Q Do you consider that that was worthless?

A. Yes, sir.

Q. Then there was two packages of drugs from the Stewart & Holmes Drug Company.

A. That was in the same condition—damaged 100%—all ruined.

Q. Then there were two packages of stage wardrobes; what were those?

A. These were customes and things like that, I suppose.

Q. For the actors?

A. Yes; that was all flimsy stuff, and goods that I don't think could be washed; that the different colors all ran and the steam and heat got into them and it was a total loss—the colors run, I know that.

Q. Now, there were ten cases of claret wine; what condition were they in?

A. That was a total loss; it all ran out of the bottles, just on the same principle as the wine, it was damaged 100%.

Q. Two cases of gin?

A. All case goods were damaged the same.

(Testimony of W. A. Malloy.)

Q. The two cases of Hostetter's Bitters?
A. The same.
Q. One case of imported sherry?
A. The same.
Q. Five cases of Gold Medal liquor?
A. The same.
Q. One case of Rock and Rye Crystal?
A. The same.
Q. And there were two cases of Bonacamp Bitters? A. The same.
Q. And two cases of Angastura Bitters?
A. The same.
Q. One case of imported port wine?
A. The same.
Q. One case of Pousse Café?
A. The same.
Q. Ten cases of Wild Cherry?
A. The same.
Q. Four cases of Italian Vermouth?
A. The same.
Q. Four cases of French Vermouth?
A. The same.
Q. One case of Irish whisky?
A. The same.
Q. Four cases of Scotch whisky?
A. The same.
Q. Two cases of W. C. Bitters?

(Testimony of W. A. Malloy.)

A. The same.

Q. One case of Three Star Hennessy brandy?

A. The same.

Q. All those bottled goods in cases were totally ruined? A. Yes, damaged 100%.

Q. There were two boxes of lay-outs; were those faro lay-outs?

A. Yes, different games.

Q. Well, what was the condition of those?

A. Well there was steam and heat got into them and damaged them very badly and the cards peeled off the broadcloth and all twisted up in bad shape. I think they were damaged about 50%.

Q. Now, there were three roulette wheels.

A. They were damaged 100%; the steam heat just pulled them all apart and took the veneering off and everything.

Q. Did they have numbers or figures on them?

A. Yes, sir.

Q. And they were ruined? A. Yes, sir.

Q. Total loss? A. Yes.

Q. And there was a bookmaker's wheel, what was the condition of that?

A. That was about the same, 100%; the colors all run and the glass was broken, by steam and heat.

Q. Then there were 19 check trays, what were they?

(Testimony of W. A. Malloy.)

A. They were for the different games. They all pulled apart and the glue dissolved and the broadcloth was destroyed—damaged 100%

Q. Three hundred and twenty dozen of bicycle playing-cards; what condition were they in?

A. Badly damaged, all stuck together in bad shape—damage 100%.

Q. Were any of them any account at all.

A. Some of them could be used, very little.

Q. There were 35 dozen packages of faro cards; what condition were they in?

A. They were in the same condition, all stuck together.

Q. Now, there was another chuck-a-luck tub.

A. There was two of them packed in some other goods and they were both ruined.

Q. There were several invoices of dice of various kinds, hazard dice and—

A. They were all destroyed.

Q. Now, there was 54 doors, what condition were they in?

A. Well, they were damaged; some of the panels were cracked and pulled apart, some of them, and the glue dissolved. Damaged probably 40%.

Q. Then there was a lot of sash and windows—glazed sash.

(Testimony of W. A. Malloy.)

A. There was some glass broken in them, I suppose by the steam and heat.

Q. To what extent?

A. Some of the panels were pulled apart and damaged probably 50%.

Q. Now, there was a box of glass, consisting of two glass lay-outs, what condition were they in?

A. Total loss—all broke to pieces, I suppose by steam and heat.

A. A box of lithographs.

A. The same condition, all destroyed, 100% damage.

Q. Two skeleton safes, what were they?

A. They were quarter inch steel and had all sorts of goods packed in them; the paint was all peeled off them and the silver or nickel plated knobs were all damaged—damaged about 40% on the safes.

Q. And in those safes there were two Hazzard cups and a lot of dice which you mentioned; what condition were they in?

A. Damaged 25%. The dice were a total loss, all of them.

Q. And the markers, 175 markers.

A. The same, all stuck together.

Q. And there was one Will & Finck card-cutter.

A. That was all steam bent and rusted; damaged 50%.

(Testimony of W. A. Malloy.)

Q. Then there was one Will & Finck trimming shears. A. The same, 50% damage.

Q. Then there was one Parker Hammerless gun, cost $300.

A. That was the price I paid for the gun, that was my own gun—$300. Of course that was all steamed up and rusted inside and I had it cleaned up afterward and fixed up—probably damaged 25%.

Q. Then there was one 36-caliber Marlin rifle.

A. The same.

Q. One 22-calibre Marlin rifle.

A. Twenty-five per cent damage.

Q. Two 41-calibre Colt revolvers.

A. Twenty-five per cent damage.

Q. One pair of large shears.

A The same, 25% damage.

Q. Three fold-up faro lay-outs, what condition were they in?

A. They were a separate package from the two boxes. There was one of that lot damaged 100%, and the other lot 50% I think those two boxes I gave you that instead of 50% it was 100—those two special ones I think was damaged 50%.

Q. Three Will & Finck rosewood case keepers.

A. They were damaged 75—some of them pulled apart. They are nickel rods to keep the buttons on and they were tarnished—25% damage.

(Testimony of W. A. Malloy.)

Q. Three Will & Finck number 1171 faro boxes.

A. They are silver boxes—$20 a box—they were tarnished about 25%.

Q. Then there were 3 Will & Finck broadcloth—faro cloth, cost $20; what condition were they in?

A. Damaged about 50.

Q. Fifteen hundred Star faro checks.

A. Total loss.

Q. And 1,500 Challenger faro checks.

A. Damaged the same—total loss.

Q Fifteen hundred Roman faro checks.

A. Damaged the same.

Q. And four card cases.

A. They were pulled apart; the glue dissolved—damaged 25%.

Q. There was one Bamboo fishing-rod.

A. That cost $25; it was twisted and damaged 100%.

Q. Six new Klondike dice boxes.

A. Damaged 100%.

Q. Four dozen and seven bookmaking balls.

A. The same.

Q. Two sets of Hazzard dice.

A. The same.

Q. One set of fighters' dice.

A. The same.

Q. Two sets of chuck-a-luck dice.

(Testimony of W. A. Malloy.)

A. The same.

Q. Twelve sets of crap dice.

A. The same.

Q. Twenty-four sets of Klondike dice, magenta.

A. They were all ruined—damaged 100%.

Q. A lot of towels, sheets, pillow cases, lace curtains and portierres which were packed in the skeleton safe? A. Damaged about 60%.

Q. And there was 15,000 blanks and tickets?

A. They all swelled up and warped out of shape—a total loss.

Q. Fifty-three and 1/4 yards of muslin, 26 1/4 yards of calico, 64 1/4 yards of cheese cloth, 18 yards of calico, and so forth.

A. Well, that was all moist and the steam heat went through it and some of the colors ran. I considered that a total loss—100%.

Q. Now, in the barreled goods, you have spoken of barrels of whisky and the amount of loss on those.

A. Yes.

Q. Did that include the barrel of Jamica rum and blackberry brandy and syrup?

A. No; there was a difference—the whisky was damaged 35 and all the other barreled goods, such as wines and rums and Scotch and all that 30%.

(Testimony of W. A. Malloy.)

Q. Then there was eight barrels of wine, what kind of wine was that?

A. California wine; that was damaged about 30%.

Q. Did that include the California Reisling, and the California claret?

A. Yes; there was one lot with two barrels and the other with a barrel of each kind, that includes both of them; about 30% damage.

Q. There was two cases of toilet paper; what condition did that come in?

A. Well, that was all wet, steamed and moist and damaged about 50%; there was some of that could be used.

Q. Then there was a case of wood work consisting of 24 brackets; what condition were those brackets in?

A. Some of them pulled apart; they were damaged 40%.

Q. Then there were 24 pieces of sewer pipe, five double T's and one single T and one case of chimney tops.

A. They all seemed to be cracked from the heat and steam, I should judge; damaged 90%. There was a few of them all right and held together, but most of them were cracked.

Q. Then there were two bundles of canvas.

(Testimony of W. A. Malloy.)

A. That was moist, damaged about 25% by steam heat.

Q. Then there were five packages of tinware.

A. Damaged about 60%.

Q. Then there was one bundle of 6 tents, and canvas for partitions.

A. That was about the same, moist and the steam heat went through it, and the damage was probably 40%.

Q. There were 14 rolls of paper, is that the building paper?

A. Building paper that goes up the side; that they put the outside boards on. There was tar paper and building paper. There was a lot of it stuck together, and the building paper was all soaked with steam and warped in bad shape. I put it all at 100% damage. There might have been a few bundles that were good; I think I would put it at 100% damage.

Q. Do you remember having saved any of the bundles?

A. I think there was two or three of the bundles that could be used, but there was nothing done with it; it was throwed out with a lot of the junk and never sold.

Q. Could you not find any sale for it?

A. No, sir.

(Testimony of W. A. Malloy.)

Q. On the bill of lading there are two crates of S pipes.

A. Russian stovepipe; that was all tarnished and rusted and damaged about 75%.

Q. Then there were 22 kegs of nails.

A. A lot of them were stuck together in chunks and rusted; the steam heat got into them—damage about 75%.

Q. Were any of those kegs burned?

A. I think one or two kegs were burned, one end of them. There was one keg short, I don't know whether it was from the fire on board the boat—I have an idea it was scattered around on the boat. There was 21 kegs landed and there should have been 22.

Q. There were 10 cases of mineral water?

A. That was damaged. Some of it opened and some of it, the bottles were cracked and some of it ran out; that was damaged 60%.

Q. There was one tent and package of tent poles bought Feltiz Bros.

A. That was damaged 35%.

Q. Twenty-two bundles of glassed sash, but I believe I asked you about that.

A. I think you did.

Q. Then there were 3 cases of fire extinguishers.

A. They were nickel-plated, I think, they were

(Testimony of W. A. Malloy.)

tarnished and the steam heat had got in to them, and they were damaged probably 50%.

Q. I believe I asked you about the cases of cigars? A. Yes.

Q. There was one case of oilcloth.

A. That was damaged about 60%.

Q. And 2 cases of splashers, 2 bundles of linen, one carpet, one crate of mirrors and one bale of carpets.

A. That came under the head of furniture; damaged 60%. Those carpets, the steam got into them and the heat, and some of the color ran in bad shape—about 65% damage all told.

Q. Then there were 12 cases of flasks.

A. A total loss. Damaged by steam heat; some of them broke; a person might have got one good case out of the whole lot. Some of them as they struck the air they just broke all to pieces.

Q. Then there was a case of corks, labels and so forth.

A. That was 100 damage—all destroyed.

Q. There was one case of glass signs.

A. One hundred per cent damage—all cracked up by steam heat.

Q. Total loss? A. Yes, sir.

Q. There were three cases of seltzer bottles and one case of seltzer powder, what were those?

(Testimony of W. A. Malloy.)

A. They came under the head of bar glassware from Harrison-Treat. That was damaged. They exploded and all went to pieces—they were damaged 100%—they were a total loss. The glassware was damaged 60%, I guess—all that came under the head of glassware, and particularly those that exploded.

Q. What were those three seltzer bottles used for?

A. To make seltzer water, and the powders and things went with them—they were all damp and moist in room number 2.

Q. A crate of 2 air-tight stoves, and 2 large air-tight stoves.

A. They were from Miles & Company, and from the Standard Club. They were all rusted and twisted, mostly by heat and steam—damaged 35%.

Q. And packed inside the stoves was a lot of soap and boxes of candles.

A. That was all totally destroyed, 100%.

Q. Five packages of tickets and tickets reels and machines.

A. That was a total loss, 100%.

Q. One enunciator with wires and appliances from the Northwest Fixture Company; what was the condition of it?

(Testimony of W. A. Malloy.)

A. I think I put that at 100%; it all came apart —it had to be put together and some time spent on it; the steam heat pulled it apart.

Q. After it was fixed up was it any use?

A. Yes, it was sold.

Q. How much did it sell for compared with the cost of fixing it up?

(Objected to as irrelevant, immaterial and incompetent.)

A. If I recollect right probably it might have been one day's work put in on it to get it together in shape, I don't know just exactly.

Q. Then there was a lot of stage wardrobe, you have testified about that? A. Yes.

Q. That you say was all ruined.

A. Yes, 100% damage.

Q. Then there was one package of dusters, whisk-brooms and pans and brushes purchased from the Golden Rule Bazaar. A. All damaged.

Q. To what extent?

A. One hundred per cent.

Q. Fifty thousand blanks, perforated, 4,000 tickets and 2,000 pads, what was their condition?

A. Total loss, all stuck together.

Q. Then there was 100 sets of door checks.

A. Printed matter, little checks to pass in and out; they were in the same condition.

(Testimony of W. A. Malloy.)

Q. One thousand wine lists and 3,000 salary lists.

A. In the same condition.

Q. All ruined? A. Yes, sir.

Q. Then there was a package of rubber stamps and packed together with them a bottle of ink.

A. One hundred per cent.

Q. Then there was another roulette wheel and case of lay-outs, all from the Standard Club.

A. That was in better shape than the other two; that was only damaged 50%; the other two were damaged 100.

Q. There were 3 cases of shoo-fly flasks, do you remember what became of them?

A. They were all broke—damaged 100%.

Q. Did I ask you about the gold scales and the weights that went with them?

A. I think you did.

Q. What condition were they in?

A. As I said before, it was all tarnished and damaged by steam heat, 75%.

Q. Did I ask you about the bundles of doors?

A. Yes, sir.

Q. Now, there was a lot of corrugated iron bought from John Shram & Company; do you remember the condition they came ashore in?

A. Yes; some of it was twisted and some paint had run on it, and it was damaged 20%.

(Testimony of W. A. Malloy.)

Q. Then there was a lot of galvanized iron bought from the same company? A. Yes, sir.

Q. What condition was that in?

A. Well, it was rusted and seemed to be in bad shape, probably 50% damage.

Q. Then there was a lot of valley tin.

A. That was about the same, that was for the building.

Q. And a lot of kitchen furniture, tinware and utensils, purchased from the Golden Rule Bazaar.

A. Fifty per cent damage.

Q. Several packages of tinware purchased from the Standard Furniture Company.

A. Sixty per cent.

Q. Is there anything else in that cargo that I have not asked you about that you remember?

A. I don't think so; that is, I cannot remember anything further.

Cross-examination.

Q. (Mr. POWELL.) Who was the purser of the boat, do you remember?

A. I think Mr. Triggs.

Q. Now, they made three distinct attempts to put out the fire; they turned on the steam once and opened up hatches and found the fire was still there, and made a second application, opened up the

(Testimony of W. A. Malloy.)

hatches and found the fire was still there, and then they made a third application of steam.

A. No, sir, I think they was only two attempts. They opened up the hatch two or three times and went down in there and wanted to see where the fire originated, and, as I said, they went into the case goods and found some case goods had been burned.

Q. Was the hold pretty well filled up with freight? A. Yes, sir.

Q. What were those goods that were thrown overboard—liquors?

A. There was some wines—mostly champagne.

Q. Case goods? A. Yes, sir.

Q. I believe you testified that the value of the entire cargo of the "Santa Ana" on this voyage was in your judgment between ninety and one hundred thousand dollars? A. Yes, sir.

Q. Now, what was the rest of the cargo besides the Standard Theater Company, or do you know?

A. Well, there were all kinds of goods used in a mining country; there was machinery; there was groceries and hardware and all different kinds of other goods.

Q. Do you have a sufficiently accurate knowledge of the rest of the cargo and its value to enable you to do anything more than to make a guess at it?

A. How's that?

(Testimony of W. A. Malloy.)

Q. Do you have a sufficiently accurate knowledge of what the rest of the cargo was and its value to enable you to do anything more than to make a guess at the value of the entire cargo?

A. Well, I am just judging from our outfit that we had aboard. We had probably—the other outfit was probably two-thirds larger than ours—I am going by that. Just by the amount of the cargo aboard; I know that they refused cargo; they could not take any more. I know there was a lot of valuable goods on that boat.

Q. The purpose that the Standard Theater had was to start a retail business in Nome and use those goods in its retail trade? A. Yes, sir.

Q. Going to run a saloon and theater and cafe and gambling-house, all in one big building.

A. Yes, everything combined. I intended to stay in that winter, and if I did not stay I would have my man take charge. I intended to make a couple of thousand per cent profit on the goods. I didn't go there to wholesale them or anything.

Q. A large part of this cargo, such as the lumber and the finishing lumber and the stage fittings and the stage finishing and the scenery and all that sort of thing, were manufactured for the special purpose of being used in this theater which you people were going to run up there? A. Yes, sir.

(Testimony of W. A. Malloy.)

Q. And the lumber and all that was cut to sizes?

A. Yes.

Q. It was a sort of knock-down building?

A. Yes.

Q. And those doors which you testified about and the windows and so forth, were to go into that building? A. Yes, sir.

Q. Now, did you ever sell any of those doors on the market up there? A. Yes, sir.

Q. And windows, too? A. Yes.

Q. Have you any books of account, or has the Standard Theater Company, showing what portion of this cargo you sold up there and what prices you received for it?

A. There was a book, but it has been mislaid. The man that brought back the money that he sold the goods for—we settled up among my partners and we straightened up everything.

Q. Have you ever made any search for that book?

A. Not recently.

Q. Please do that and see if you can't locate it?

A. Yes.

Mr. BRINKER.—Is that the book of sales?

Mr. POWELL.—Sales of the damaged cargo.

A. (By the WITNESS.) Well, the sales were kept on pads by five or six men and I would allow

(Testimony of W. A. Malloy.)

them a commission and they would bring them in nights and I would leave the goods there and I entered it into one of these little small books (showing his pocket book), and that was mislaid, but I think I can find it.

Q. (Mr. POWELL.) That book showing the total amount of sales,would it show the different items and what each article sold for?

A. Yes, it would show what the items sold for.

Q. I wish you would find that if you can.

A. All right, sir.

Q. Now, you testified to the amount of Jamaica ginger that was damaged.

A. Fifty per cent of the keg goods.

Q. That is about what ran out?

A. Well, there was a half or three-quarters, and some of them one-third ran out, and some a half—they were about a quarter full or something like that.

Q. Did you measure them all to see?

A. Yes, I ran a rule down every barrel and each keg and we could see from the bung hole where it ran over on each side—it just came out.

Q. Did you have anything to do with stowing the cargo at Seattle?

A. I was down there when they were putting it on; I was not down there in the hold.

(Testimony of W. A. Malloy.)

Q. You would not know in what part of the hold any particular piece of the cargo was stowed?

A. Well, it was on board up where they were putting it down in the hold at the front deck; was there nearly every day they were loading and I saw them putting some goods in, but I was not there all the time.

Q. Now, taking these case goods; do you know in what part of the hold those goods were stowed?

A. I know very near. They took up the hatch and went down after the goods.

Q. You saw them in there?

A. I saw them goods in there.

Q. Now, where, in reference to the case goods was these bar fixtures stowed?

A. They seemed to be up more in the bow of the boat.

Q. Higher up and more to the bow?

A. Yes.

Q. More forward? A. Yes.

Q. And where was the piano stowed with reference to the case goods?

A. That I could not say, that was probably close to the bar fixtures.

Q. Now, where was the bar glassware stowed, do you remember?

A. I could not say where that was. The case of

(Testimony of W. A. Malloy.)

wines and the bar fixtures, I remember where they were, but the other things I do not.

Q. I believe you testified that the towels and splashes were damaged 50%—they were stowed in the safe.

A. Yes, in the skeleton safe.

Q. Now, in what did the damage consist of?

A. All that stuff in there, all that stationery and stuff was all swelled up and the towels and things was rusted and there was colors in the towels that ran together, red and everything together—that is not all of it, I would say about 60%; some of it was all right, but the doors of the skeleton safe did not close together; they were about quarter of an inch apart, and the force of the steam and heat just forced itself right into that safe. There was about a quarter of an inch between the door and the other piece.

Q. Well, those towels and muslins and calicoes are all washable stuff?

A. Well, the supposition is yes, that it is washable.

Q. The towels and splashers?

A. Calicoes, of course, ran badly—the towels were supposed to be washable stuff.

Q. And the muslin? Did the smoke get into them and color them? A. No, sir.

Q. Now, you say the Scotch whisky was damaged about 30%. A. Yes.

(Testimony of W. A. Malloy.)

Q. Was that in cases?

A. Some in cases; and all that was destroyed, and the other in barrels damaged 30%.

Q. How do you arrive at that amount of value?

A. Simply because I measured it with my rule. I went in and there was so much, according to the gauger's list was not in the barrel.

Q. How was the canvas that you spoke of being damaged?

A. Well, it was all moist and damp and stuck together in bad shape.

Q. Was there anything else the matter with it, was it smoked or burned or anything?

A. No; it was not burned.

Q. You cannot hurt canvas by getting it moist, can you?

A. Well, you take new canvas in bundles like that and you soak it with steam heat and probably salt water and it would damage it, I should think.

Q. Now, you say the tent poles were damaged 35%; what was the matter with the tent poles?

A. I mean by that the tents and the poles; the poles you might say there was such a pressure of heat and there was irons on the ends of the poles and they were rusted and the poles might have been twisted some; I put it at that damage.

(Testimony of W. A. Malloy.)

Q. What damage was done to the fire extinguishers?

A. They were all tarnished and spotted and rusted.

Q. Well, that would not injure their effectiveness?

A. Yes; if you go to sell them you would have to sell them for second-hand stuff. You could not get that stuff back to its original color.

Mr. POWELL.—I may want to recall Mr. Malloy for further cross-examination, but that is all now.

Redirect Examination.

Q. (Mr. BRINKER.) I want to ask about these carpets and tents and things which you say were damaged by the steam heat and so forth. I want to call your attention to a matter particularly and ask you whether it was so. Whether the drugs and groceries, liquors and wines and stuff which you say come out of the bottles and kegs and barrels; whether any of those things came in contact with the canvas and carpets and woolen fabrics.

A. Well, all that came in contact with steam heat and water and it was all damaged.

Q. What I mean is, for instance if a package of drugs was broken and red fire and stuff of that kind, and a package of flour and a package of sugar or

(Testimony of W. A. Malloy.)

liquors and wines, whether that ran over the carpets and over the cotton fabrics which you speak of.

A. If it would?

Q. Did they bear any evidence of having come in contact with those things which had been spilled in the hold.

A. No, not so much. There was something ran on the piano. It looked like some kind of wine, claret wine or something. I remember a kind of red streak down on the piano and a lot of wax and stuff run down there.

Q. Did any of the wine or groceries get into the bundle of carpets or things of that kind.

A. No, I don't think so, not that I recollect.

Q. (By Mr. POWELL.) Did you finally sell that piano? A. Yes.

Q. How much did you get for it?

Mr. BRINKER.—He sold the piano and the bar fixtures together.

A. (By the WITNESS.) That cost $215 here and I gave a check for it—

Q. (Mr. POWELL.) How much did you get for it?

A. I don't know how many days' work was put on it; I think it was sold for, I think $150 or $160.

Q. How much did you get for the bar fixtures?

(Testimony of W. A. Malloy.)

A. I got about $600. I got $1,000 for a lot of stuff and I included that in the bar fixtures; a lot of other articles which made probably two or three thousand dollars worth of stuff that I throwed in for $1,000.

Q. (Mr. BRINKER.) You stated awhile ago in answer to Mr. Powell that there was a lot of the stuff which you left there which you did not sell at all.

A. No, sir—it was there all winter.

Q. Did you ever sell it?

A. I never sold it. There was bunches of goods. I sold one bunch for ninety dollars. There might have been a couple of thousand dollars' worth of stuff, if they were right goods, but we could not give them away—I don't know what the fellow did with them—he peddled them off.

Q. Has that stuff which you left there ever been sold since?

A. No, sir, not that I know of.

Q. Did you leave it for scale?

A. I left it in charge of a fellow, Tom Erkhart knows about it.

Q. Did Tom Erkhart and this man you left there ever since make any sales, or remit to you the proceeds of any sales of the stuff which you left there when you went away?

A. No, sir.

(Testimony of W. A. Malloy.)

Q. Will you hunt up that book and any other paper or memorandum which you have which you kept while you were selling off this cargo.

A. Yes, I will.

Q. Do you remember some beer being sold to Ed. Powers?

A. I think Harry Gordon sold that. I had five or six men selling stuff on commission. Harry Gordon sold that—I think that was the only thing he sold.

Q. Did not Joe Livingston sell some to Ed. Powers? A. I think he did.

Q. Both of them?

A. Yes, Joe Livingston sold some.

Q. There were three barrels sold to Ed Powers, altogether? A. Yes, sir.

Q. Do you remember what you got for it?

A. Fifteen or sixteen dollars a barrel.

Q. Just to refresh your recollection, you sold it for eighteen dollars a barrel, but you settled at fifteen after Ed's death? A. That's right.

(Testimony of witness closed.)

Seattle, Washington, September 17, 1904.

10 o'clock A. M.

Mr. Brinker appeared on behalf of libelant, and stated that he had the consent of Mr. Powell, of

(Testimony of W. A. Malloy.)

counsel for claimant, to offer the depositions in Mr. Powell's absence.

Mr. BRINKER.—Libelant offers the depositions of W. H. La Boyteaux and M. C. Harrison, now on file in the office of the clerk of the court.

Libelant rests, with the privilege of introducing further testimony in chief, it it shall be so advised.

And thereupon an adjournment was taken to be thereafter agreed upon by the respective parties.

Seattle, Washington, Nov. 15, 1904, 3 o'clock P. M.

J. H. Powell, Esq., proctor for claimant, and W. H. Brinker, Esq., proctor for libelant appeared, and further hearing was adjourned until January 16th, 1905, at 10 o'clock A. M.

January 16th, 1905, 10 A. M.

Hearing resumed pursuant to adjournment.

W. A. MALLOY, recalled on behalf of libelant, testified as follows:

Q. (Mr. BRINKER.) Exhibit No. 9—I don't think you stated when you were examined before what the amount of damage on that was, and I show it to you now (handing to witness), and ask you if you remember about that? That is the bill for the stage hardware—blocks, tackles, sheaves, clamps, hooks and eyes, etc.?

A. Oh, they will run about 40 per cent damage.

(Testimony of W. A. Malloy.)

Mr. BRINKER.—Mr. Powell, here is a bill that I want to substitute for Exhibit No. 9; it is a duplicate of Exhibit No. 9.

Mr. POWELL.—No objection; just substitute it.

(Bill substituted and marked Exhibit No. 9.)

Q. I will ask you now to state what these figures in pencil on the foot of Exhibit No. 9 are?

A. That is C. O. D. and return charges—express charges on the stage hardware.

Q. Now, as to Exhibit No. 19, Mr. Malloy, your testimony does not show that you stated what the damage to that bill of goods is. It is a bill from Baker & Richards. You didn't state how much those goods were damaged, as I remember, in reading your testimony in the former examination?

A. That is damaged about 50 per cent.

Q. Now, No. 38— I don't find that you made any statement in your testimony as to the amount to that?

A. That is a lot of straps. That was a total loss; damage 100 per cent on that.

Q. Exhibit No. 39—you don't state what the damage to that was. State, if you remember—some blankets and some oilcloths?

A. That is about 60 per cent damage.

Q. No. 53. You stated that this liquor in barrels in Exhibit No. 53 was damaged, but you didn't state

(Testimony of W. A. Malloy.)

the amount of the damage, as I recollect your testimony, Mr. Malloy?

A. I think I testified about that.

Q. You stated it was damaged, but you don't state the amount?

A. I think I testified to that about 30 per cent.

Q. Now, No. 60—

Mr. BRINKER.—Mr. Powell, there is a duplicate of Exhibit No. 60; it is the extra charges, and I want to substitute this for the other.

Mr. POWELL.—That is all right.

Q. What did you say the damage on that was?

A. Sixty per cent.

Q. Exhibit 61; that is the straw paper; I don't find that you testified what the damage to that was?

A. That was a total loss.

Q. Exhibit No. 62 is the bill of Marlin; that is only two dollars, but I don't find that you testified as to what the damage on that was?

A. Oh, that was about 40 per cent.

Q. No. 63. Five boxes of cartridges, 38, Smith & Wessons; you didn't testify as to those—what were those; blank cartridges?

A. Blank cartridges. Well, they were, I should judge, a total loss; they were not used at all; thrown away.

(Testimony of W. A. Malloy.)

Q. You didn't say how much that was damaged. In Exhibit No. 70; you don't say how much that was damaged.

A. About 40 per cent that was damaged. That runs 25, 35 and 40—40 per cent, I think that was. Some were damaged worse than others.

Q. Exhibit No. 78; that appears to be a freight bill, paid through the Seattle National Bank?

A. That was freight on a case of glass signs.

Q. And exhibit No. 79 is that bill of finishing lumber—fine lumber from Rolfe & Schroeder; you haven't stated the amount of damage there was to that. If there was any damage, state what it was?

A. That is maple, ash, and cedar legs of tables, pins, etc. A lot of them was all finished up—painted and varnished and oil finished to use in tables and different things. Some were taken up in knock-down shape.

Q. About what was the amount of damage?

A. Oh, that would run about—just about 35 per cent.

Q. Now, Exhibit No. 80 is for some wire grill-work, and you didn't state what the amount of damage was to that?

A. Well, that was all rusted by the steam and water on it. Put that about 35 per cent.

(Testimony of W. A. Malloy.)

Mr. BRINKER.—Now, Mr. Powell, I want to substitute this bill for the original exhibit. The condition the original has gotten into, it is hard to handle. This is a duplicate of it.

Mr. POWELL.—No objection.

(Substitution made.)

Mr. BRINKER.—Here is one I want to substitute for No. 12.

Mr. POWELL.—What is the difference between them?

Mr. BRINKER.—The difference is there are some figures down at the bottom—I don't know what they are. There is the one we introduced in evidence, and then there are the express charges or something at the bottom.

Q. I will ask you to look at Exhibit No. 12, Mr. Malloy (handing to witness), substituted for the original exhibit No. 12, and I will ask you to state what the figures on that exhibit are that appear in indelible pencil?

A. The "$39.50" is express charges made from New York to Seattle, and the "$1.40" is return money charges back to New York.

Mr. POWELL.—I haven't any objections.

(Testimony of W. A. Malloy.)

Mr. BRINKER.—We will just substitute one for the other.

(Paper above referred to substituted for the original exhibit No. 12.)

Q. I will show you a bill, Mr. Malloy, from the Northern Pacific Railway Company, marked $2.85, and ask you to state what that is?

A That is freight on a box of weights from New York to Seattle.

Q. Weights of what? A. Scales.

Q. Gold scales? A. Gold scales.

Mr. BRINKER.—We will offer that in evidence.

(Bill marked Libelant's Exhibit No. 81, and returned herewith.)

Q. Now, on page 317 of your testimony, you testified that certain hazard cups were damaged 25 per cent. Now do you want to stand by that, or do you want to make a change in your testimony as to that?

A. Why that was—they all came apart. They were damaged, I should judge, 100 per cent. I don't know how I came to make that 25 per cent; they were damaged 100 per cent. They all fell apart.

Q. You want to change that to 100 per cent?

A. Yes, sir.

Q. Now, there were a lot of poker chips shown on Exhibit No. 42, I don't think you testified as to the amount of damage that they sustained, did you?

(Testimony of W. A. Malloy.)

A. It was 100 per cent. They were all destroyed stuck together and useless.

Q. Now in your testimony, at page 354, you were asked about a number of the items upon Exhibit No. 16. It appears here that you were asked about one thousand wine lists, and 3 thousand salary lists. Now there are a number of other items on that exhibit, and I will ask you to state what the condition of this cargo that you made, and you would look it

A. That was all a total loss—damaged by heat, steam and water.

Q. Now you stated to Mr. Powell, Mr. Malloy, that you had, or had had, at Nome, a memorandum, or various memoranda, showing the amount of sales of thos cargo that you made, and you would look it up and produce it here; have you found that book containing those memoranda?

A. No, sir. When I came back from Nome, I took that over to the Standard, and we settled up.

Q Standard what? A. Standard Club.

Q. Whom did you settle up with?

A. My partners. That was left in my writing desk, with a lot of papers and things, and when I looked for them some time ago, the writing desk was all cleaned out, and I couldn't find that little book. Probably it was burned up, when the porter cleaned up around there, where all those things were located.

(Testimony of W. A. Malloy.)

Q. Now have you looked every place that you know where to look for that memorandum—the memoranda and the book? A. Yes, sir.

Q. And couldn't find it? A. No, sir.

Q. And so when you testified as to the amount of your sales, what was your testimony based upon?

A. Well, it was based on that little memorandum-book I had.

Q. Well, it was based upon your recollection of what was in it? A. Yes, sir.

Q. Now, there were a lot of stage settings on that cargo, about which you testified, but you have not stated what they were—what they consisted of, nor what they cost, nor the amount of the damage. Now will you state what those stage settings consisted of?

A. Well, the scenery frames, big drop curtain—

Q. Well, would you call the drop curtain a stage setting?

A. I should judge so—all combined were stage settings; I should judge that was what you would call it.

Q. I am asking you now about the stage settings that are shown in one of the exhibits here testified to by some other witness. State what they were, as you recollect it?

A. Well, there was scenery frames, curtains—the same thing we call drops; I don't know whether it

(Testimony of W. A. Malloy.)

was drop curtains or what. I am not familiar with them stage settings.

Q. Do you know what they cost, all of them?

A. Why the contract, I think, was $700 for all that work.

Q. Well, that was for painting scenery, wasn't it?

A. Painting scenery, and the curtain, I should judge—the whole thing—the total contract was about $700.

Q. Now, in Exhibit 52 there is a receipt here for $306 for painting scenery. Have you any other vouchers for that work?

A. I have, yes; there is one of the new vouchers.

Q. Just select them out there, will you? (Handing papers to witness.) Is this the only one (referring to paper handed to counsel by the witness)?

A. That is the only one there I have the vouchers. There is one of them without vouchers.

Q. Exhibit 52 is one, but isn't there another one?

A. This is the other one (indicating).

Q. And isn't there one for $6 somewhere?

A. Well, yes. That is in the new vouchers too.

Q. It is among those? See if you can find that (handing papers to witness). Now what are these two bills; what are they for—or receipts, or whatever they may be?

(Testimony of W. A. Malloy.)

A Yes, sir— it is painting baize; that is used in connection with the scenery frames on the stage, and the other is painting scenery; that is painting drop curtain—scenery frame and curtain in connection with the other bill—one of the old exhibits.

Q. Exhibit 52? A. Yes.

Mr. POWELL.—Are those going in as part of Exhibit No. 52?

Mr. BRINKER.—I suppose we better put them in as part of 52, and not make a new exhibit out of them. Just attach them to Exhibit 52.

(Papers attached to Exhibit 52.)

Q. Now, in the testimony in, some places, there are some goods that are called "card cases," and in other places the words "card racks" are used. What are card cases and card racks?

A. That is simply the same thing; you can call them card racks, or card cases. That is to hold the packs of Faro cards—10 to 12 packs; they hold them —each card case.

Q. I don't remember that you testified concerning the amount of damage to the building paper that is mentioned in Exhibit 25. What was the amount of the damage to that?

(Testimony of W. A. Malloy.)

A. I think I stated on that that it was 100 per cent. It was all stuck together with water and steam.

Q. Those papers were all stuck together, and you couldn't unroll them?

A. Water and steam all went through it; it was all wet.

Q. And in the same exhibit there was acme or Russian iron stovepipe. What amount of damage was done to that?

A. I put that about 40 per cent; I think I testified about that once.

Q. And then there were a lot of nails in that same exhibit—22 or 23 kegs of nails, and I haven't any memorandum of the amount of damage to those nails in your testimony. What was the amount of damage to those nails, as you remember it?

A. They run—some were damaged a little more than the rest. I think I put that 60 per cent. I testified to that once—I know I did.

Q. I will ask you, Mr. Malloy, if you sent all of the invoices of this cargo, as far as you had them, to the adjuster in San Francisco, when the matter was pending before him? A. Yes, sir.

Q. I will ask you if you received those—all of those invoices back again? A. No, sir.

Q. Now, what effort have you made since to sup-

(Testimony of W. A. Malloy.)

ply the loss of any of those invoices that were sent to the adjuster?

A. Well, I had to make—to get a lot of duplicates of those original invoices, and them that I couldn't get I made myself.

Q. From your own recollection of what was in the cargo? A. Yes, sir.

Q. Now, I will call your attention to the items in the bills that you now have in your hand; there are some leather Klondike boxes—chuck-a-luck lay-out, etc.; have you a bill for those?

A. Yes, sir (showing paper to counsel).

Q. Just look that up.

A. Here it is (handing paper to counsel).

Q. Whose goods were those?

A. The Standard Theater Company's.

Q. Were they a part of that cargo?

A. Yes, sir.

Q. What condition did they arrive in at Nome?

A. Well, they were all destroyed—all the leather boxes, and chuck-luck lay-out, bookmaking balls—were all useless—ruined by the steam heat and water.

Mr. BRINKER.—I will offer this in evidence.

(Paper marked Libelant's Exhibit No. 82, and returned herewith.)

(Testimony of W. A. Malloy.)

Q. Now, have you found a voucher for two glass bookmaking lay-outs? A. Yes, sir.

Q. Were those goods part of the cargo of the "Santa Ana" on this voyage? A. Yes, sir.

Q. Whom did they belong to?

A. The Standard Theater Company.

Q. You testified as to the condition that they arrived in, but we had no bill for them.

Mr. BRINKER.—I will offer that in evidence.

Q. You did testify they were a total loss?

A. Yes, sir.

Q. But we had no bill for that?

A. Yes, sir.

Mr. POWELL.—I shall object to the introduction of Exhibits 82 and 83, on the ground that they are incompetent. I can't see how these exhibits are anything more than Mr. Malloy's oral testimony.

(Last paper offered marked Libelant's Exhibit No. 83 and returned herewith.)

Q. Now, there is another; there was one roulette wheel lay-out, costing $175, according to this memorandum. You testified before that it was damaged about 50 per cent; that it was in better condition than the others? A. Yes, sir.

Q. All I want to do now is to identify the exhibits, if you have one there, and offer it, subject to the same objection Mr. Powell made before.

(Testimony of W. A. Malloy.)

A. Here it is (handing paper to counsel).

(Paper referred to marked Libelant's Exhibit No. 84 and returned herewith.)

A. The Standard Theater bought it from the Standard Club.

Mr. POWELL.—I make the same objection to Exhibit No. 84,

Q. There were three sets of crap dice; have you got an invoice for those?

A. Yes, sir. Paid John Considine $5 for that. (Hands paper to counsel.) The other original bill was sent to Frisco. That was lost with other bills.

Mr. BRINKER.—I offer that in evidence.

Q. In what condition did that reach Nome?

A. They were a total loss from heat and water.

Q. They were part of this cargo, were they not?

A. Yes, sir.

(Last paper offered by counsel marked Libelant's Exhibit No. 85, and returned herewith.)

Q. I have an invoice for a chuck-luck tray, bookmaking tray, two poker trays, two curved racks for craps, and two curved racks for 21—games?

A. Yes, sir; total $72.

Q. Were they part of that cargo?

A. Yes, sir.

Q. Whose goods were they?

(Testimony of W. A. Malloy.)

A. Standard Theater Company's.

Mr. BRINKER.—I offer that as evidence.

Mr. POWELL.—I make the same objection.

(Paper marked Libelant's Exhibit No. 86, and returned herewith.)

Q. Have you another invoice for crap dice, $10.50? A. Yes, sir.

Q. You testified as to those before, on page 341 to 346 of your testimony?

A. Those are crap dice.

Q. They were part of the cargo, were they?

A. Yes, sir.

Q. And totally destroyed?

A. A total loss.

Mr. BRINKER.—We will offer that exhibit in evidence.

Mr. POWELL.—This is the original invoice, isn't it—bill?

A. No; that is just—the original invoice is lost; I haven't got it. This shows the amount we paid here, $10.50. This don't state just what the goods are, but they are dice.

Mr. BRINKER.—I offer that in evidence.

Mr. POWELL.—I make the same objection.

(Testimony of W. A. Malloy.)

(Paper marked Libelant's Exhibit No. 87, and returned herewith.)

Q. You testified about some Will & Fink trimming shears and round card-cutter?

A. Sixty dollars.

Q. You didn't have any invoice for them?

A. No; that was lost down there with the others.

Q. Have you one now?

A. Yes, sir (producing paper and handing to counsel).

Q. I think you testified as to what the amount of the damage was?

A. Yes, sir; I testified about that.

Mr. BRINKER.—We offer that as an exhibit.

Mr. POWELL.—I make the same objection.

(Paper marked Libelant's Exhibit No. 88, and returned herewith.)

Q. Then you testified as to 12 dozen faro cards, on page 334 of your testimony which you didn't have a voucher for then. Have you a voucher now?

A. Yes, sir. (Handing paper to counsel.) 1 gross was bought from the Standard Club; the Standard Theater Company bought from the Standard Club.

Q. What condition did they arrive there in?

A. They were a total loss.

(Testimony of W. A. Malloy.)

Mr. BRINKER.—We offer that exhibit in evidence.

Mr. POWELL.—I make the same objection.

(Paper marked Libelant's Exhibit No. 89 and returned herewith.)

Q. You testified about two card cases, but you didn't have a voucher for them; have you got a voucher now?

A. Two of the card cases—in one of the old exhibits, and two in the new, I think. There were four card cases, all told.

Q. Yes, sir, but I am asking you now for the vouchers. There are two among the exhibits that are already in evidence?

A. Yes, sir, and two in the new exhibits. I have got the two in the new ones (producing paper) $16.

Q. You testified as to all of them?

A. Yes, sir.

Q. Now, you had an exhibit for two additional ones? A. Yes, sir.

Mr. BRINKER.—We will offer that in evidence.

Mr. POWELL.—I make the same objection.

(Paper marked Libelant's Exhibit 90 and returned herewith.)

Q. Then you have an invoice for $4.90 worth of dice?

(Testimony of W. A. Malloy.)

A. Yes, sir. (Producing paper and handing to counsel.)

Mr. BRINKER.—We offer that in evidence.

Mr. POWELL.—I object to that as incompetent, irrelevant and immaterial.

(Paper marked Libelant's Exhibit No. 91 and returned herewith.)

Q. You didn't testify as to the condition of those dice, as I remember; what condition did they reach there in?

A. They were a total loss, the same as the rest of the dice. All the dice was lost—destroyed.

Q. Have you a voucher for 30 sets of Magenta dice and 1500 Magenta checks? A. Yes.

Q. And 1500 Club checks?

A. One hundred and forty-two dollars and fifty cents (produces voucher and hands to Mr. Brinker).

Q. Were they part of the cargo of the "Santa Ana" on this voyage?

A. Yes, sir, and belonged to the Standard Theater Company.

Q. In what condition did they reach there?

A. They were a total loss—ruined by heat, steam and water.

Mr. BRINKER.—I offer this in evidence.

Mr. POWELL.—I make the same objection.

(Testimony of W. A. Malloy.)

(Voucher marked Libelant's Exhibit No. 92 and returned herewith.)

Q. Now, have you a voucher for a lot of dice, roulette balls, etc., amounting to $175?

A. Yes, sir. (Produces voucher and hands to Mr. Brinker.)

Q. Were these goods part of the cargo of the "Santa Ana" of this voyage? A. Yes, sir.

Q. Whom did they belong to?

A. The Standard Theater Company.

Q. And what condition did they reach Nome in?

A. The dice was a total loss and the roulette balls a total loss, the blanks a total loss, the lay-outs a total loss, and the Klondike lay-outs, they were damaged about 25 per cent.

Q. How about the faro cloth?

A. They were all stuck together, and the numbers peeled off, you know. I put them a total loss, outside of the burnt ash lay-out.

Mr. BRINKER.—I offer this in evidence.

Mr. POWELL.—I make the same objection.

(Voucher marked Libelant's Exhibit No. 93 and returned herewith.)

Q. Have you another invoice of dice, $9?

A. Yes sir (hands paper to Mr. Brinker.)

Q. Was that part of that cargo?

A. Yes, sir.

(Testimony of W. A. Malloy.)

Mr. BRINKER.—I offer that in evidence.

Mr. POWELL.—I make the same objection.

(Invoice marked Libelant's Exhibit No. 94 and returned herewith.)

Q. What condition did they get there in?

A. They were a total loss.

Q. Have you an invoice for one crap table knock-down, $75?

A. Yes, sir. (Hands paper to Mr. Brinker.)

Q. Is that part of this cargo? A. Yes, sir.

Q. Whom did it belong to?

A. The Standard Theater Company.

Mr. BRINKER.—I offer that in evidence.

Mr. POWELL.—I make the same objection.

(Invoice marked Libelant's Exhibit No. 95 and returned herewith.)

Q. What condition did they reach Nome in?

A. Why, I think I testified to that, Judge. The varnish came all off of the table legs, and the broadcloth lay-out—left the cards stuck together, and everything. I judged about 40 per cent. I think I testified to that once.

Q. Have you an invoice for crap tables, roulette tables, etc., amounting to $227.50?

A. Yes, sir. (Hands paper to Mr. Brinker.) That is the total for making a certain amount of

(Testimony of W. A. Malloy.)

tables, on there, and repairing the Considine green tables.

Q. That bill includes certain tables, and also certain work repairing other tables, does it not?

A. Yes, sir.

Q. Was that work paid for in the amount specified in the invoice?

A. How is that?

Q. Was the work paid for in the amount specified in that invoice? A. Yes, sir.

Q. Whom did those goods belong to?

A. The Standard Theater Company.

Q. And were they a part of this cargo?

A. Yes, sir.

Mr. BRINKER.—I offer that in evidence.

Mr. POWELL.—I make the same objection.

(Paper marked Libelant's Exhibit No. 96 and returned herewith.)

Q. What condition were those in?

A. They were damaged about 40 per cent.

Q. Have you an invoice for express paid upon a package of dice, 32 pounds, amounting to $3.50?

A. Yes, sir. (Hands paper to Mr. Brinker.)

Q. Now how was that?

A. That is express on 40 pair of dice.

Q. For whom?

A. The Standard Theater Company.

(Testimony of W. A. Malloy.)

Q. Did they become a part of the cargo on the "Santa Ana" on this voyage to Nome?

A. Yes, sir.

Q. Was that express paid by the Standard Theater Company? A. Yes, sir.

Mr. BRINKER.—We offer that in evidence.

Mr. POWELL.—I make the same objection.

(Paper marked Libelant's Exhibit No. 97 and returned herewith.)

Q. Have you a voucher for $45.50, for labor on goods, $20.86?

A. Yes, sir. (Hands paper to Mr. Brinker.)

Mr. BRINKER.—We offer that in evidence.

Mr. POWELL.—I object to it as incompetent, irirrelevant and immaterial.

(Paper marked Libelant's Exhibit No. 97 and returned herewith.)

Q. Have you a voucher for drayage paid Miller, amounting to $9, on those goods?

A. Yes, sir. (Hands paper to Mr. Brinker.)

Mr. BRINKER.—We offer that in evidence.

Mr. POWELL.—I object to it as incompetent, irrelevant and immaterial.

(Paper marked Libelant's Exhibit No. 99 and returned herewith.)

(Testimony of W. A. Malloy.)

Q. Have you a voucher from A. Harrison & Company amounting to $48.50?

A. Yes, sir, $48.50. (Hands paper to Mr. Brinker.)

Q. Whose goods were those?

A. The Standard Theater Company's.

Q. Is that the amount of their cost?

A. Yes, sir.

Q. Do they constitute a part of the cargo of the "Santa Ana" on this voyage to Nome?

A. Yes, sir.

Mr. BRINKER.—We offer that in evidence.

Mr. POWELL.—We make the same objection.

(Paper marked Libelant's Exhibit No. 100 and returned herewith.)

Q. What condition did those goods reach Nome in?

A. Well, water, steam and heat got all through them. That was a total loss.

Q. Have you a voucher for $45.50, for labor on those goods?

A. Yes, sir. (Hands paper to Mr. Brinker.)

Q. What is that for?

A. That is for help packing the goods that went on the Steamship "Santa Ana"—two helpers I had.

Q. Was that packing paid by the Standard Theater Company? A. Yes, sir.

(Testimony of W. A. Malloy.)

Mr. BRINKER.—We offer that in evidence.

Mr. POWELL.—We object to that as incompetent, irrelevant and immaterial.

(Paper marked Libelant's Exhibit No. 101, and returned herewith.)

Q. Have you a voucher for $13.50 for hauling goods?

A. Yes, sir. (Hands paper to Mr. Brinker.) That is hauling goods to the hall where we had all the Standard Theater Company outfit stored.

Q. Hauled it to the dock?

A. Some of it was hauled to the dock, and some was up to the Owl Club, where we had our Carpenter Hall—where we kept all the goods in; some hauled from the express office or freight house.

Q. Was that paid by the Standard Theater Company? A. Yes, sir.

Mr. BRINKER.—We offer that in evidence.

Mr. POWELL.—Same objection.

(Paper marked Libelant's Exhibit No. 102, and returned herewith.)

Q. Have you a voucher from Baker & Richards for $150 of gypsum, etc.? A. Yes, sir.

Q. That was purchased by the Standard Theater Company? A. Yes, sir.

Q. And went in this cargo to Nome?

(Testimony of W. A. Malloy.)

Mr. BRINKER.—We offer that in evidence.

Mr. POWELL.—I make the same objection.

(Paper marked Libelant's Exhibit No. 103 and returned herewith.)

Q. What condition did they reach there in?

A. Well, that was damaged about 60 per cent, I should judge.

Q. You testified that a part of this cargo consisted of stage wardrobes, etc. Have you a voucher from Alberni for the purchase price of those stage wardrobes?

A. Yes, sir. (Hands paper to Mr. Brinker.) have got the express bill there, that I can't get hold of.

Q. You have got the bill for the original cost, have you not?

A. Yes, sir, $143 paid to Mr. Nadeau, here; one for $133 and one for $10.

Mr. BRINKER.—We offer these two bills in evidence as one exhibit.

Mr. POWELL.—I make the same objection.

(Two bills pinned together and marked Libelant's Exhibit No. 104 and returned herewith.)

Q. Have you a voucher for some printed lists—salary lists, etc., $5.25?

A. Yes, sir. (Hands paper to Mr. Brinker.)

(Testimony of W. A. Malloy.)

Mr. BRINKER.—We offer that in evidence.

Mr. POWELL.—The same objection.

(Paper marked Libelant's Exhibit No. 105, and returned herewith.)

Q. I will ask you if the goods in the voucher belonged to the Standard Theater Company?

A. This last voucher? A. Yes, sir.

Q. Were they part of this cargo?

A. Yes, sir.

Q. What condition did they reach Nome in?

A. Well, they were all destroyed by steam, heat and water. I considered them a total loss; damage one hundred per cent.

Q. Have you a voucher from the Red Front Furnishing Company, for a couple of revolvers?

A. Yes, sir. (Hands paper to Mr. Brinker.)

Q. Who purchased these revolvers?

A. Mr. Considine.

Q. Well, for whom?

A. The Standard Theater Company.

Q. Did they constitute a part of this cargo?

A. Yes, sir.

Mr. BRINKER.—We offer that in evidence.

Mr. POWELL.—I make the same objection.

(Paper marked Libelant's Exhibit No. 106 and returned herewith.)

(Testimony of W. A. Malloy.)

Q. And what condition did they reach Nome in?

A. Well, they were rusted by steam, heat and water getting into them.

Q. How much were they damaged, would you say?

A. About 75 per cent. They were of no account.

Q. Have you a freight bill from the Pacific Coast Steamship Company for $4.65, freight on cigars, etc.?

A. Yes, sir. (Hands paper to Mr. Brinker.)

Q. Was that paid by the Standard Theater Company? A. Yes, sir.

Q. That was a part of this cargo?

A. Yes, sir.

Mr. BRINKER.—We offer that in evidence.

Mr. POWELL.—I make the same objection.

(Paper marked Libelant's Exhibit No. 107, and returned herewith.)

Q. Have you a voucher from Lowman & Hanford for letterheads, $3.75?

A. Yes, sir. (Hands paper to Mr. Brinker.)

Q. Whom were these goods purchased for?

A. The Standard Theater Company.

Q. Were they a part of this cargo?

A. Yes, sir.

Q. In what condition did they reach Nome?

A. They were a total loss— all damaged by heat, steam and water.

(Testimony of W. A. Malloy.)

Mr. BRINKER.—We offer that in evidence.

Mr. POWELL.—I make the same objection.

(Paper marked Libelant's Exhibit No. 108 and returned herewith.)

Q. Have you a voucher from the Globe Ticket Company for 100 sets of door checks?

A. Yes, sir, $5.20. (Hands paper to Mr. Brinker.)

Mr. BRINKER.—We offer that in evidence.

Mr. POWELL.—I make the same objection.

(Paper marked Libelant's Exhibit No. 109 and returned herewith.)

Q. Whom were they purchased for?

A. The Standard Theater Company.

Q. Were they part of the cargo on the "Santa Ana" that went to Nome on this voyage?

A. Yes, sir.

Q. What condition did they reach Nome in?

A. They were a total loss.

Q. Have you a voucher from the Ballard Union for a lot of tabs and tickets, $18.25?

A. Yes, sir. (Hands paper to Mr. Brinker.)

Q. For whom were these goods purchased?

A. The Standard Theater Company.

Q. And were they a part of this cargo?

A. Yes, sir.

Mr. BRINKER.—We offer this in evidence.

(Testimony of W. A. Malloy.)

Mr. POWELL.—I make the same objection.

(Paper marked Libelant's Exhibit No. 110 and returned herewith.)

Q. That is 50,000 blanks perforated, 4,000 tickets and 2,000 tabs. You testified as to those before—as to the condition is which they reached there. Have you a voucher from the Pacific Coast Steamship Company for freight on wine?

A. Yes, sir. (Hands paper to Mr. Brinker.)

Q. Was that freight paid upon goods that were part of the cargo on this voyage? A. Yes, sir.

Q. By the Standard Theater Company?

A. Yes, sir.

Mr. BRINKER.—We offer that in evidence.

Mr. POWELL.—I make the same objection.

(Paper marked Libelant's Exhibit No. 111 and returned herewith.)

Q. And have you a voucher from G. McGovern for hauling freight to the Colman Dock?

A. Yes, sir; that is goods he hauled over to the Colman Dock. (Hands paper to Mr. Brinker.)

Q. Was that for $89? A. Yes, sir.

Q. Was that a part of the goods that constituted the cargo of the cargo of the "Santa Ana" on this voyage? A. Yes, sir.

Q. To whom do they belong?

A. The Standard Theater Company.

(Testimony of W. A. Malloy.)

Q. Was that paid by the Standard Theater Company for hauling goods to the dock?

A. Yes, sir.

Mr. BRINKER.—We offer that in evidence.

Mr. POWELL.—I object to that for the same reason.

(Paper marked Libelant's Exhibit No. 112 and returned herewith.)

Q. Now, have you a voucher from Joseph Leary & Bros. from some aluminum and brass checks, $24?

A. Yes, sir. (Hands paper to Mr. Brinker.)

Q. What were these?

A. Why they were checks for drinks.

Q. For whom?

A. The Standard Theater Company.

Q. Did they constitute part of the cargo of the "Santa Ana" on this voyage? A. Yes, sir.

Mr. BRINKER.—We offer that voucher in evidence.

Mr. POWELL.—Same objection.

(Paper marked Libelant's Exhibit No. 113 and returned herewith.)

Q. What condition did they reach Nome in?

A. They were rusted and damaged, I should judge, about 50 per cent.

(Testimony of W. A. Malloy.)

Q. Now, have you a voucher from M. Peterson for services rendered the Standard Theater Company, $273.50?

A. Yes, sir. (Hands paper to Mr. Brinker.)

Q. What was that for?

A. That was helping me pack goods—doing different work around with me for four months there, on and off.

Q. On what goods?

A. Standard Theater Company's goods

Q. Well, the goods that constituted a part of the cargo of the "Santa Ana" on her voyage in 1900, May 26, to Nome? A. Yes, sir.

Q. Was that amount paid Mr. Peterson for his services? A. Yes, sir.

Mr. BRINKER.—We offer that in evidence.

Mr. POWELL.—I object to it as incompetent, irrelevant and immaterial.

(Paper marked Libelant's Exhibit No. 114 and returned herewith.)

Q. You testified that there was among the cargo on this vessel upon the voyage of May 26, 1900, a cosmic bamoo fishing rod? A. Yes, sir.

Q. Have you a voucher for that?

A. Yes, sir. (Hands paper to Mr. Brinker.)

Q. And two revolvers and two Marlin rifles—were they part of the cargo on this vessel? A. Yes, sir.

(Testimony of W. A. Malloy.)

Q. And belonged to the Standard Theater Company? A. Yes, sir.

Mr. BRINKER.—We offer that voucher in evidence.

Mr. POWELL.—I make the same objection.

(Voucher marked Libelant's Exhibit No. 115, and returned herewith.)

Q. Have you a voucher from the J. S. Brace Lumber Company, for finishing lumber, etc., $47.90?

A. Yes, sir, $47.90 and $7.78—two bills. (Hands papers to Mr. Brinker.)

Q. Was that a part of the cargo on the "Santa Ana"? A. Yes, sir.

Q. To whom did it belong?

A. The Standard Theater Company. That was stuff made into door frames, window frames, and such stuff as that.

Mr. BRINKER.—We offer them in evidence.

Mr. POWELL.—Same objection.

(Papers marked Libelant's Exhibit No. 116 and returned herewith.)

Q. Have you a voucher from the Whitton Hardware Company for hardware, ninety cents?

A. Yes, sir, four little bills. (Hands paper to Mr. Brinker.)

(Testimony of W. A. Malloy.)

Q. Was that part of the cargo on this vessel on this trip? A. Yes, sir.

Q. Whom did it belong to?

A. The Standard Theater Company.

Mr. BRINKER.—We offer that in evidence.

Mr. POWELL.—Same objection.

(Paper marked Libelant's Exhibit No. 117 and returned herewith.)

Q. What condition did the goods on that bill arrive in at Nome?

Q. Have you a voucher for $14.95, including wharfage, on cigars, etc.?

A. About two per cent damaged.

A. Yes, sir. (Hands paper to Mr. Brinker.)

Q. For whom was that money expended?

A. The Standard Theater Company.

Q. And the goods mentioned in that voucher, what became of them; were they shipped on this vessel on this voyage?

A. They were shipped on the steamship "Santa Ana."

Mr. BRINKER.—We offer that in evidence.

Mr. POWELL.—Same objection.

(Paper marked Libelant's Exhibit No. 118 and returned herewith.)

(Testimony of W. A. Malloy.)

Q. What condition did the goods mentioned in that voucher arrive at Nome in?

A. "One bottle of stamping ink"—that was destroyed. "Six bottles of oil"—destroyed. "Six small nickel-plated oil cans"—about 25 per cent damage on them. "Two padlocks"—about 25 per cent damage on them.

Q. Have you a voucher for $15.80 for various items?

A. Yes, sir. (Hands paper to Mr. Brinker.)

Q. For whom were the goods purchased contained in that voucher mentioned, and the services rendered?

A. The Standard Theater Company.

Mr. BRINKER.—We offer that in evidence.

Mr. POWELL.—I make the same objection.

(Paper marked Libelant's Exhibit No. 119 and returned herewith.)

Q. What condition did the goods in that voucher mentioned arrive at Nome in. Some chamois skins and chamois skin sacks, etc.?

A. Oh, I make that about 50 per cent damage.

Q. Have you a voucher for a package of lithographs, purchased by J. W. Considine at New York.

A. One hundred and seventy pounds of lithographs, purchased by J. W. Considine at New York.

Q. Whom were they for?

(Testimony of W. A. Malloy.)

A. The Standard Theater Company.

Q. Was that money paid out by the Standard Theater Company? A. Yes, sir.

Q. And did those lithographs constitute part of the cargo of the "Santa Ana" on the voyage mentioned? A. Yes, sir; $77.30.

Mr. BRINKER.—We offer that in evidence.

Mr. POWELL.—We make the same objection.

(Paper marked Libelant's Exhibit No. 120, and returned herewith.)

Q. Now, you testified before to a combination stove, and you didn't have any voucher for it; have you got one now?

A. Yes, sir. (Handing paper to Mr. Brinker.) Forty dollars. That was purchased for the Standard Theater Company. That was purchased of a fellow that had a little den this side of Miles Piper Company's store, where they are now, in 1900—sold a lot of these stoves—was selling them like hotcakes—so I went up there and bought one of them for this company. They are out of business now. The original bill for that went down below—was lost or mislaid.

Mr. BRINKER.—We offer that in evidence.

Mr. POWELL.—Same objection.

(Testimony of W. A. Malloy.)

(Paper marked Libelant's Exhibit No. 121 and returned herewith.)

Q. Now, there were 12 sets of crap dice and 24 sets of Klondike Magenta Dice; have you a voucher for those; amounting to $36?

A. Yes, sir. (Hands paper to Mr. Brinker.)

Q. You testified before about those, but didn't have the voucher for them? A. No, sir.

Mr. BRINKER.—We offer that in evidence.

Mr. POWELL.—I make the same objection.

(Paper marked Libelant's Exhibit No. 122 and returned herewith.)

Q. Then have you a voucher for a lot of dice, Hazard Cups, Spotted dice, Birdseye Dice, etc., amounting to $34?

A. Yes, sir. (Hands paper to Mr. Brinker.)

Q. You testified about these, if I remember, but you had no voucher for them.

Mr. BRINKER.—I offer this in evidence.

Mr. POWELL.—I make the same objection.

(Paper marked Libelant's Exhibit No. 123 and returned herewith.)

Q. Have you a voucher for express charges on gambling tools, for $41.30?

A. Yes, sir. (Hands paper to Mr. Brinker.)

Mr. BRINKER.—I offer that in evidence.

(Testimony of W. A. Malloy.)

Mr. POWELL.—I make the same objection.

(Paper marked Libelant's Exhibit No. 124 and returned herewith.)

Q. Have you another voucher from Baker & Richards for goods? A. Yes, sir; $6.20.

Q. Well, whose goods were those?

A. They belonged to the Standard Theater Company.

Q. Did they constitute part of the cargo of the "Santa Ana"? A. Yes, sir.

Mr. BRINKER.—We will offer that in evidence.

Mr. POWELL.—I make the same objection.

(Paper marked Libelant's Exhibit No. 125, and returned herewith.)

Q. What condition did they reach Nome in?

A. Well, they were damaged about 50 per cent.

(Testimony of witness closed.)

At this time further hearing was adjourned until 2 P. M.

Seattle, January 16, 1905, 2 o'clock P. M.

At this time proctors for both parties met and an adjournment was taken until to-morrow morning, Jan. 17, at 11 A. M.

(Testimony of W. A. Malloy.)

Seattle, Washington, 11 A. M.
Tuesday, Jan. 17, 1905.

Present: Mr. W. H. BRINKER, for Libelant.
Mr. JOHN H. POWELL, for Respondent.

Continuation of proceedings pursuant to adjournment, as follows, to wit:

Mr. W. A. MALLOY, a witness on behalf of libelant, on the stand:

Q. (Mr. BRINKER.) Mr. Malloy, I show you an account presented here, certified to be correct in the sum of $118.70, made by Mr. Lane for various sums of money that he claims to have expended for the Standard Theater Company, and ask you to look at that and say if you know anything about it?

A. Yes, sir. I paid Mr. Lane this money for these articles.

Q. And on whose account?

A. The Standard Theater Company.

Q. For matters connected with the cargo that was shipped upon the "Santa Ana" to Nome?

A. Yes, sir.

(Paper referred to marked as Libelant's Exhibit No. 126 for identification.)

Q. I want to ask you, Mr. Malloy, there was a large quantity of gambling tools, dice and playing cards—things of that character—and I think when you were cross-examined by Mr. Powell before, you

(Testimony of W. A. Malloy.)

were asked what use those things were to be put to up there at Nome by the Standard Theater Company. I will ask you practically the same question now. For what purpose were those gambling appliances taken to Nome?

A. Well, they were taken, some of them, to be used by the Standard Theater Company, and the most of them to be retailed out—to be sold at Nome.

Q. What proportion of them were to be used by the Standard Theater Company?

A. Oh, probably twenty-five or thirty per cent of them.

Q. And the balance you expected to sell?

A. To retail out; yes, sir.

Q. Now, is there anything else, Mr. Malloy that I have not asked you that you think of in connection with this matter at this time?

A. I think that is all, Mr. Brinker.

Cross-examination.

Q. (Mr. POWELL.) I show you now Exhibit No. 19. Is not that a bill for supplies purchased from Baker & Richards to be used in the manufacture of these various pieces of furniture and fixtures and appliances that were being made for the Standard Theater Company here in Seattle?

A. No, sir. These all went north on the "Santa Ana."

(Testimony of W. A. Malloy.)

Q. And were to be used there?

A. Yes, sir.

Q. And what was it to be used for, in fixing up the various pieces of furniture, fixtures, paraphernalia and so forth that was being shipped up there?

A. Well, it was to be used for different things; in case we made any tables up there or anything of that kind we was to use it for that purpose, and if tables got scratched going up there or anything, why, it was to retouch them after they got there.

Q. Now, I show you Exhibit No. 38. I believe you testified that those items that are enumerated therein were a total loss? A. Yes, sir.

Q. What was their condition when they arrived at Nome?

A. Well, they were all warped and kind of burned like; they seemed to be close to where there was the most heat, or something.

Q. Damaged by the heat? A. Yes, sir.

Q. Scorched?

A. Heat, water, steam and everything, yes, sir. They were throwed in the junk pile, they wasn't any good—couldn't be used.

Q. Now, I show you Exhibit No. 9 for stage hardware; you said that was damaged about forty per cent. In what did that damage consist?

(Testimony of W. A. Malloy.)

A. Well, those were pulley wheels and different items connected with stage scenery—hardware of different kinds. They seemed to be rusted and water, steam and stuff got into them.

Q. Well, were they ever used?

A. Some of them might have been, and some of them was not, probably.

Q. Could you tell now which ones were used and which were not?

A. That would be a hard thing to tell. I think there was some of them was used, some was not, if I remember right.

Q. Well, what was the reason for some of these not being used?

A. Well, there might have been more than they wanted, more than they had any use for. If I recollect right there was a small box left there that was not used.

Q. Now, I show you Exhibit No. 39, some blankets and oilcloth. I believe you say that was damaged about sixty per cent. What was the condition of that stuff when it arrived there?

A. The oil cloth all stuck together—that in fact was not used—it was throwed away; the blankets, I put them sixty per cent on that; the water and steam went through them, and I think one or two of them blankets, the corner of the bundles of them, were scorched. I put the damage sixty per cent on them

(Testimony of W. A. Malloy.)

Q. Were those blankets all done up in a bundle?

A. Yes, sir, kind of a square bundle.

Q. In a case? A. Yes, sir.

Q. How badly was the scorching?

A. That small case of them, the corner was burned and the blankets—the corner of the blankets was burned a little, or scorched.

Q. Now, I call your attention to Exhibit No. 53, which is Crown Distiller's whisky. That, I believe you said, was damaged about thirty per cent?

A. Yes, sir.

Q. Now, what was the condition of those goods?

A. Well, sir, the bung hole on those barrels, it showed where the liquors had run out and down the sides of the barrels; the barrels were all short, seven, eight, and ten gallons—in that neighborhood. I put that damage at thirty per cent.

Q. Now, the whisky that was in the barrels that was left was all right, wasn't it?

A. Well, some of it was all right and some of it was not. There was some complaints about the tasting of it—it didn't have just the right taste.

Q. What did you do with it?

A. I sold it out.

Q. What did you sell it for?

A. Sold it for what I could get for it.

(Testimony of W. A. Malloy.)

Q. Well, how much was that? Have you got any memorandum of that sale?

A. No, sir. I sold some of it for forty dollars—fifty dollars—sixty dollars—eighty dollars.

Q. Who did you sell it to?

A. Different ones in business there—

Q. By the barrel you mean?

A. Yes, sir. Sold some as low as forty dollars.

Q. Now, the chief injury to that whisky was the loss in bulk, was it not?

A. Not particularly.

Q. What I mean to ask is, if it is not a fact that the loss in the case of this whisky was not chiefly from the amount that had run out—been lost out of the barrels?

A. Well, it was caused by the steam and heat.

Q. Well, but I mean there was not any damage to the quality of the whisky, nearly so much at least as there was in the loss of the quantity, was there?

A. Yes, it was some damage to that, too. That was done by steam heat, the supposition is.

Q. Well, when did you find any complaint about the taste of the whisky?

A. Several parties in business complained about it.

Q. That is, after you sold it?

(Testimony of W. A. Malloy.)

A. Yes, sir. I didn't know it at the time, but they complained afterwards.

Q. How many of these barrels gave evidence of having been very close to the fire? Were any of them scorched?

A. There was two or three that the fire charred right into the staves, two of them in particular, about a quarter of an inch into the staves.

Q. Now, these whisky barrels, were they all stowed in practically the same place, in the hold?

A. No, I don't think so. I would not say for sure about that.

Q. You do not remember exactly where they were stowed—as a matter of fact, you would not know where they were stowed exactly in the hold, I suppose.

A. No; I wasn't there when they put them down in the hold.

Q. Now, I show you Exhibit No. 60 for two pair of tights. I notice that that bill is made out to J. W. Considine, People's Theater, Seattle. Now, how does that come about?

A. Mr. Considine ordered that from San Francisco for the Standard Theater Company.

Q. And it was billed to him?

A. Yes, sir. There was one lady in the company was larger than any of the rest, and she had to have

(Testimony of W. A. Malloy.)

special tights—two pairs of special tights, the way I understand it. They did not come with the tights from Alberni, in Chicago, that was a special order. I put the damage on them sixty per cent.

Q. Now, what was the condition of these goods?

A. Well, they seemed to be all wet, and the color run in them, and one thing and another.

Q. Were they ever used that you know of?

A. Not that I know of; no, sir.

Q. Now, I call you attention to Exhibit No. 63, I believe you stated that those cartridges were a total loss, as you remember it? A. Yes, sir.

Q. Did you see them after they arrived in Nome, yourself? A. Yes, sir.

Q. What appeared to be the trouble with them?

A. Well, they seemed to be all corroded; they was never used; they were throwed in the old junk pile.

Q. Now, I show you Exhibit No. 70, which is for tools, a bill from Schwabacher Hardware Company, made out to J. W. Considine; I notice this bill was made on January 6th, 1900. Now was the Standard Theater Company buying supplies for this trip that early? A. Yes, sir.

Q. Right here in the city? A. Yes, sir.

Q. What would be their object in buying their tools to be shipped in May along in January?

(Testimony of W. A. Malloy.)

A. Well, they bought them to be—they started in working on that frame—sash and window frames and door frames and all that stuff.

Q. They bought these tools then to be used in making the stuff that was manufactured here before it was shipped?

A. Some of it, I think, was bought for that purpose, but most of it was to be for the building up above.

Q. Can you segregate it so you can tell what was to be used here? In other words, how much can you say now was shipped on the "Santa Ana" of that bill of goods?

A. All of this went on the "Santa Ana"—all of this order, every bit of it.

Q. Now, you testified those goods were damaged about forty per cent?

A. About forty per cent.

Q. What was the condition of them when they got there?

A. Well, they were all rusted by the steam and heat and corroded; there was not a bright piece in the whole outfit. They were damaged, I put it, forty per cent.

Q. They were put up in cases?

A. Some of it was packed—a lot of that stuff was

(Testimony of W. A. Malloy.)

repacked. Peterson and myself and a couple of helpers repacked it—it was put in some boxes.

Q. Now, did they show any evidences of being close to the fire?

A. Well, they showed the rust on it, steam, heat and water.

Q. Did they show any evidence of having been damaged by the heat?

A. Well, that I couldn't say.

Q. Now, I will show you Exhibit No. 79 for some kind of woodwork, a bill from Rolph & Schroder amounting to $81.37. I believe you testified that was damaged about thirty-five per cent. What was the condition of that shipment when it arrived there at Nome?

A. There was a lot of this was for—some of it was knocked down tables; it was all finished and put in packages. It seemed to be some of it swollen, and one thing and another. There was some circles and the legs of the tables seemed to be cracked—seemed to be in where there was a lot of heavy heat and steam, water and everything got on it. I put that down as about thirty-five per cent.

Q. Well, did those articles show any evidence of having been near the fire?

A. Yes, they did. Some of that work was finished up by Mr. Peterson and it seemed to be blistered—spots on it—some of the legs.

(Testimony of W. A. Malloy.)

Q. Were they not done up in cases or crates?

A. Yes, kind of crates, open though between the slats.

Q. Did the crates show any evidence of having been in contact with the fire?

A. I have an idea they did, if I recollect right.

Q. Now, I call your attention to Exhibit "E," the one I think Judge Brinker examined you on as Exhibit No. 76, wire grillwork, for $237; I will show you this Exhibit No. 76 for a lot of stuff there you purchased from Green. Now what condition did that arrive in at Nome?

A. Why, the desk was in very bad shape, the veneering all came off—it all fell apart, you might say.

Q. Did it come in contact with fire—any of that stuff?

A. I don't think so. I don't think that it did. That was damaged mostly by heat and steam and water.

Q. Well, this was crated, was it not, most of this stuff?

A. The writing desk was crated, yes, sir; just with a light framework around it.

Q. Well, do you remember distinctly whether or not any of that stuff had come in contact with a fire?

(Testimony of W. A. Malloy.)

A. No, not as I remember of. The big suit wheel, in that the glass had all been cracked, it seemed to be close where there was a lot of heat around it so that the glass was all cracked.

Q. I show you Exhibit No. 16, paper goods from the Ballard Union. In what condition did that arrive at Nome?

A. That was all soaked with water. We throwed that in the junk pile, all of it.

Q. I believe you testified that the Hazzard cups were damaged about a hundred per cent? What is a Hazzard cup?

A. It is a cup to throw dice in—something in that shape (showing). It was all varnished up and all fastened together, and the varnish all came off.

Q. Now, you testified that the building paper was damaged a hundred per cent. What condition was that in? A. That was all soaked with water.

Q. Had it come in contact with fire, do you remember?

A. I couldn't say about that. I know it was throwed out in the junk pile—never used.

Q. And these kegs of nails you speak of being damaged sixty per cent. Had they come in contact with the fire at all, that you remember?

A. One keg of that was scorched, yes, sir.

Q. How badly was it scorched?

(Testimony of W. A. Malloy.)

A. One end of it was burned off, exposing the nails.

Q. Now, I call your attention to Exhibit No. 82, What is a Klondike box?

A. It is a leather box to throw dice out of—just the same as one of these dice boxes they have at the bars.

Q. I find on this same bill one chuck-a-luck lay-out and four bookmaking balls, purporting to be purchased by the Standard Theater Company from the Standard Club? A. Yes, sir.

Q. Now, what was the Standard Club, where were they?

A. It was situated on the corner of Washington and Occidental avenue.

Q. Now who composed that club, the same people that composed the Standard Theater Company?

A. Yes, sir.

Q. And who were they?

A. There was Mark Norton, George L'Abbe, Jasper Hoysington, W. A. Malloy and J. W. Considine.

Q. Now, they had some stuff that they could use in this enterprise that they were carrying on in Alaska, or going to carry on at Nome, and they just used some of their stuff, didn't they? You don't mean to say that the Standard Theater Company paid to the Standard Club $17.50 for that stuff?

(Testimony of W. A. Malloy.)

A. Yes, sir. All them bills is correct. Those boxes were not bought from the Standard Club, they were bought from Holloway here; there was a bill, but it has been lost.

Q. I am only asking about this transaction here, this chuck-a-luck layout and bookmaking balls. There are several bills like that.

A. Yes, sir. Well, we were running there five or six years, we had quite a quantity of those goods, handled a good many of them, and instead of buying at stores and different places we just bought them from the Standard Club and took them north, mostly to speculate with, hearing there was a good demand for goods there we thought we could realize a good profit by taking them north. We had enough for four or five houses, as far as that is concerned.

Q. (Mr. BRINKER.) Did the Standard Club continue in existence here while you were on your way and gone to Nome with the Standard Theater Company? A. No, sir, they were closed.

Q. Exhibit No. 83, two glass bookmaking layouts: What is a bookmaking layout?

A. Sets on a bookmaking table—the glass sets on the table and is set on in different colors on a one dollar bill, a two dollar bill and a ten dollar bill.

Q. Sort of a gambling device?

(Testimony of W. A. Malloy.)

A. Yes, sir. It is a glass lay-out.

Q. Now, I show you Exhibit No. 84 and ask you if that is another purchase from the Standard Club by the Standard Theater Company? A. Yes, sir.

Q. Now, there are several bills that I notice here of that kind, that is, purporting to be bills showing purchases from the Standard Club?

A. Yes, sir.

Q. And what you have just said a moment ago is true in regard to all of them, is it not, that the Standard Club had a great deal of this stuff on hand, and it was taken to Nome in this cargo in the manner that you have just related a moment ago—the Standard Theater Company paid the Standard Club about what they thought it was worth and took it along? A. Took it along, yes, sir,

Q. In what condition did this stuff that is shown on Exhibits Nos. 84 and 83 arrive at Nome?

A. The glasses were all broken and—

Q. Well, did they show evidence of having come in contact with the fire?

A. They were supposed to be where there was considerable fire.

Q. Had they been scorched—burned? A. No.

Q. How about this roulette wheel, Exhibit No. 84?

A. Well, that seemed to be—steam and heat had got into there and seemed to be blistered, and it had

(Testimony of W. A. Malloy.)

to be all straight—it was in very bad shape. It was not as bad as the other two Grote wheels.

Q. This was all in a crate? A. Yes, sir.

Q. Did the crate show any evidence of having come in contact with the fire?

A. No, I don't think so.

Q. All the heat that damaged this wheel came from the steam you think?

A. Steam and heat and water, yes, sir.

Q. Now, I show you Exhibit No. 86, some more paraphernalia. From whom was that bill of goods furnished?

A. Mr. F. G. Peterson made them goods for that amount of money, that was the contract, $73.00. They was made in the evenings—he made them nights as extra work.

Q. And what condition did they arrive in at Nome?

A. Well, the racks had pulled apart, the glue all dissolved, and the broadcloth was all crumpled up—heat and water and steam and everything got into it. I put those at a hundred per cent.

Q. Those were crated, I suppose, packed up?

A. Packed in a box.

Q. And did the fire get in that box?

A. No, I don't think so. I didn't see any evidence of fire. The reason there are so many different

(Testimony of W. A. Malloy.)

bills in the gambling tools there is that they were taken at certain dates right up to the time we had left. We would think of some things and take them along. Instead of having them all in one or two bills, all that stuff, it shows all the different dates, and they were packed in different boxes, some in the safes and writng desk and everything like that.

Q. I show you this bill now, Exhibit No. 92 for some dice. What condition did those arrive in?

A. That stuff was all destroyed.

Q. That was in boxes, was it not?

A. Different packages. Any place we could find room we would pack some in. It was in a whole lot of different boxes and things, some in the skeleton safe, some in the drawers and writing desk and all that. we saved all the room we could.

Q. Any of it come in contact with the fire?

A. The dice, as I say, were melted away—the spots all out of them. That was where there was a lot of heat. I didn't notice any fire on the package they were in. The cards all stuck together.

Q. That is true of all the dice, is it, or just that bill you are testifying about?

A. Some of the dice showed just the spots come out and didn't melt away like these. These thirty-seven magenta, they were worse than any of them—than any of the dice. The cards seemed to be all water-soaked.

(Testimony of W. A. Malloy.)

Q. I show you Exhibit No. 95: Now what condition was that crap table when it arrived at Nome?

A. That was knocked down. It was all finished complete to put up together at Nome. That is all hard oil finish—varnish. The broadcloth seemed to be all soaked and this varnish and stuff seemed to be peeled off—scratched and one thing and another.

Q. Was it burned any?

A. I don't think so. I didn't notice it in going over it.

Q. Now, I show you Exhibit No. 96, for some more paraphernalia of a gambling nature. What condition did that arrive in?

A. That was about the same as the other—all that run about the same.

Q. Was there any evidence of any of it having been burned so it could not be used?

A. No, sir, I didn't notice it.

Q. Had the crates been burned to any extent?

A. There was no crates around that part of the goods. They were kind of tied together like. No, I didn't notice they were burned.

Q. I show you Exhibit No. 106. One of those revolvers seems to be billed to the Standard Theater Company and one to Considine; is that right?

A. Yes, sir. They are two cheap revolvers to use with those blank cartridges—six dollars.

(Testimony of W. A. Malloy.)

Q. I show you here bill for $3.75, being Exhibit No. 108; that appears to be billed to the People's Theater Company? A. Yes, sir.

Q. Was that for the Standard Theater Company?

A. Yes, sir, that was brought for the Standard Theater Company.

Q. Now, I show you Exhibit No. 110, some more goods from the Ballard Union: What condition did that arrive in in Nome?

A. It was all soaked by steam and water. We throwed them all in the junk pile—all that stuff.

Q. Did those goods come in contact with the fire at all? A. No, sir, not as I know of.

Q. Now, I show you Exhibit No. 113, bill from Joseph Mayer & Bros.; what was the cause of the damage to those goods?

A. Well, it was water and steam—they were rusted.

Q. Was there any evidence of their having come in contact with the fire? A. No, sir.

Q. Exhibit No. 115.

A. That was all bent and warped, that was a total loss. The revolvers and rifles was rusted, water and steam—probably twenty-five per cent; The Cosmic rod was a total loss, the other was damaged twenty-five per cent.

(Testimony of W. A. Malloy.)

Q. Had it come in contact with fire at all, would you say, from the way they looked?

A. No, sir.

Q. Exhibit No. 116 for some wood from J. P. Brace & Company; now what was the cause of the damage to those goods?

A. This was work in the door frames, window frames and different other frames in connection with the stage and building.

Q. In fact, these were shipped in the form of window frames, door frames, casings and such things as that? A. Yes, sir.

Q. (Mr. BRINKER.) I don't think you testified that was damaged, Mr. Malloy?

A. No, sir.

Q. (Mr. POWELL.) Did you testify this combination stove was damaged or not, Mr. Malloy?

A. Yes, sir.

Q. How much was that damaged?

A. I think it was forty per cent.

Q. Did you say you purchased that stove down here?

A. There was a fellow had a little place by the side of where Miles & Piper Company are located now, he had a little place there, a little store. I think Mr. Petersen or some of them were with me when I purchased it.

(Testimony of W. A. Malloy.)

Q. In what was the damage to the stove?

A. It was all rusted—water and steam.

Q. When did you pay this bill of Mr. Lane's you testified about a moment ago, Exhibit No. 126?

A. That was at different times. He came to me with a little memorandum—he would buy the stuff around and would come to me and I paid the bill—some time in April or May.

Q. When did you make out that bill?

A. Mr. Lane made this out. He just made this out the other day. We lost a lot of these bills that had a lot of items in—they went down to San Francisco.

Redirect Examination.

Q. (Mr. BRINKER.) As to the membership of these two corporations: Was the Standard Club a corporation, was it organized as a corporation or was it just a partnership? A. Just a partnership.

Q. And that partnership consisted of yourself, George A. L'Abbe, John W. Considine, Jasper Hoysington and Mark Norton? A. Yes, sir.

Q. T. J. Considine did not belong to that partnership, did he?

A. I think he had an interest with John, a small interest, but he used to work for wages there and kind of look out for John when John was away. He

(Testimony of W. A. Malloy.)

was interested with John some way, I don't know how or what interest he had, whether he had any or not.

Q. Now, the Standard Theater Company was a corporation, was it not? A. Yes, sir.

Q. And was it composed of the same individuals?

A. Yes, sir.

Q. Including T. J. Considine? A. Yes, sir.

Q. Were Hoysington and Norton both members of the Standard Theater Company?

A. Yes, sir, all had their money in it.

Q. Well, when the Standard Theater Company purchased these articles that you have mentioned from the Standard Club, in what manner were they paid for?

A. Well, whenever we would see we would want something to go up there to sell—to retail out—we would loom around, and if we saw it in the Standard Club, we would buy it from the Standard Club.

Q. And pay for it? A. Yes, sir.

Q. To the Standard Club? A. Yes, sir.

Q. So you endeavor to keep the accounts of the Standard Theater Company and the Standard Club separate? A. Yes, sir.

Q. And their funds separate? A. Yes, sir.

(Testimony of witness closed.)

And thereupon a recess was taken to 1:00 the same day.

(Testimony of W. A. Malloy.)

Seattle, Washington, 1:00 P. M., Tuesday, January 17, 1905.

Present: The same as at the morning session.

Mr. A. G. LANE, recalled as a witness for and on behalf of libelant, testified:

Q. (Mr. BRINKER.) Mr. Lane, I will show you Exhibit No. 2: You did not testify to the amount of damage as to that, and I will ask you to state, if you know, what condition those goods arrived in at Nome?

A. Why, it don't seem to me—this stuff was in a washstand, and I don't recall that it was damaged very much. I think the calico, that the colors run in the calico some, but I don't think it would be damaged over thirty per cent; the muslin was cheap muslin, and it had been used, it would have been fit to have used it again; it was wet; but it was not damaged to amount to anything. The calico was damaged and the colors had run a little bit, but for the purpose it was going to be used for it would not have materially affected the muslin and cheese cloth. I think thirty per cent would cover all the damage that was sustained.

Q. Exhibit No. 8: You were not asked as to the amount of damage to the goods in Exhibit No. 8.

A. Oh, they was damaged about—I think that I

(Testimony of A. G. Lane.)

testified as to them before—they were damaged about forty-five or fifty per cent. The paint and varnish was all off of them and the doors were warped so they would not shut tight and warped to such an extent that everything in them was ruined. They were not fireproof safes anyway, they were only skeleton safes.

Q. State what condition the goods in Exhibit No. 9 reached Nome, what damage, if any, they suffered?

A. They were badly damaged—that is, stage hardware—they were damaged at least fifty per cent.

Q. I show you Exhibit No. 12, and ask you to state what condition those goods arrived at Nome in and what damage, if any, they suffered?

A. This is them two gold scales and—

Q. I remember your testimony about these was as to the condition of the weights, but you did not testify about the condition of the scales.

A. Well, the scales were beautiful scales, great big brass levers, and they were all tarnished and the brass had turned blue, and the scales and chains were all rusted and scaled off, but I wouldn't attempt to say as to the amount of damage. Of course, I didn't know very much about them scales, but they looked very bad. The glass cases they were in were all broken to pieces and they were all tarnished. I should think that those were damaged sixty per cent,

(Testimony of A. G. Lane.)

but that would be more of a guess than an actual estimate, because I didn't have much to do with them.

Q. Exhibit No. 14: You testified as to the condition those goods arrived in. Will you state what the damage to those was, if any?

A. This lot of stuff was in the boxes with the kitchen utensils were crated up in a crate and this packages that was burst—actually burst. The kitchen utensils wer ecrated up in a crate and this stuff was in it and that package was burst; it had been right into the fire. This stuff was practically a total loss altogether with the tinware and cooking utensils that were in that crate.

Q. Well, was the loss entirely from burning, or was there any from steam?

A. Of course the package was not burned, but it had been in close proximity to the heat and the tinware was warped and blistered and the water had done some damage as well.

Q. To what extent was it damaged?

A. Well, it was a total loss. All the cooking utensils and all that stuff, and the groceries that were in that crate, was a total loss.

Q. But I say, how much was it damaged by hot water and steam?

A. Well, that would be a hard matter to determine. With that nature of goods you couldn't di-

(Testimony of A. G. Lane.)

vide up the damage hardly. The crate was not burned, it was not actually burned, it was charred; it hadn't come in contact directly with the flames, but it had been close to the fire where the heat had damaged it, and of course the steam and water added to the damage, but as to the difference between the two, I could not segregate them.

Q. Now, you testified as to Exhibit No. 18, about a certain chuck-a-luck tub; there was also another chuck-a-luck tub on Exhibit No. 42 to which you did not testify. In what condition did that reach there?

A. Well, all those chuck-a-luck tubs were ruined. The steam and heat melted them—they were made of a number of pieces grooved and dovetailed together and veneered over, and they just swelled up like any piece of veneered furniture—the moisture swelled them up and melted the glue, and they fell to pieces.

Q. You were asked about certain packages of doors in Exhibit No. 17, and stated that they were damaged, but I don't remember that you stated the amount of the damage.

A. The doors were a total loss—cost more money to put them together than they were worth. They looked all right in the crates; they were nailed together, three in a bunch, and crated up strongly, and they looked well enough until we took the crates off, and then they went all to pieces. Then we found the

(Testimony of A. G. Lane.)

panel was all split and the rail all warped and twisted, and out of a hundred doors I don't think we got three of them together so that we could use them.

Q. Exhibit No. 21, for some fire extinguishers. State what condition those reached there in.

A. Well, they were badly damaged. If they had been down here we probably could have had them repaired, but they were practically a total loss up there. The top melted off of them, the gear that upsets the cup that holds the stuff was melted off of them and bent, and the tops were melted off of them and the sides were all rusted and shelled over with rusty scales. They could have been repaired if they were down here where there was a place to take them to, but there was no place up there, and they were practically a total loss.

Q. I show you Exhibit No. 36 and ask you to state what damage, if any, the goods mentioned in that exhibit sustained.

A. There was two other tents—there was one of these tents that was badly damaged and one that was not so bad.

Q. I think the other you testified about?

A. My recollection is that this was the kitchen tent, fourteen by sixteen; my recollection is that this tent was not so badly damaged as the other one. I don't think there were any holes burned in it. I

(Testimony of A. G. Lane.)

think it was only stained and greased or melted stuff that run down on it and disfigured it considerably, but I don't think it was damaged to exceed thirty per cent for use, perhaps not that much; but if you had to sell it you could not sell it for anything but a second-hand tent. It was badly disfigured and stained in that way.

Q. I show you Exhibit No. 37 for an electric annunciator; state in what condition that arrived at Nome.

A. This was a total loss; the coils were all corroded together.

Q. I show you exhibit No. 38 for some straps and ask you what condition they arrived in.

A. I can't recall. I know what they were for, but I don't recall whether they was damaged or not. I don't recall seeing them at all after we got up there.

Q. Exhibit No. 39 for some blankets and oilcloth: What condition did those arrive in?

A. The oilcloth was a total loss. The blankets were damaged about fifty per cent and the oilcloth was a total loss. The oilcloth stuck together, so when you unrolled it the figures came off on the other side of it. The blankets were disfigured and discolored with some chemical stuff that had run down through them, and the corner of some of them had been burned; the corner of the case was burned off.

(Testimony of A. G. Lane.)

Q. I show you Exhibit No. 47 and ask you to state what condition those things arrived in and how much they were damaged?

A. That was tile pipe we took up for chimneys, and out of the whole business I think we got three lengths. I think there was three lengths that was not broken or didn't break when we unpacked it.

Q. How much were they damaged?

A. They were damaged about ninety per cent at least. If we could have gotten it up there whole we could have gotten twenty-five a length for it; but the heat and steam caused it to break up. I think we got three lengths out of the whole business that we sold to Whitehead, the banker.

Q. Exhibit No. 48, for that galvanized iron, corrugated iron and so forth: What was its condition when it arrived at Nome?

A. That stuff was damaged at least fifty per cent. It was painted double, two coats of paint; it was all off of it; it was all warped and twisted and the corrugation was all out of it, the heat had softened it so it had flattened out and the paint was all off; but it could be used—some of it—and I think some was sold. I think it was damaged about fifty per cent.

Q. Exhibit No. 59 for some toweling and so forth: I will ask you to state what condition that was in.

A. That was damaged about forty per cent. That was in one of the skeleton safes.

(Testimony of A. G. Lane.)

Q. Exhibit No. 60: That is for these tights.

A. They were practically ruined. They were silk tights and they were stained and discolored and shriveled up and the stitches puckered up—looks like a rubber ball might after it had gone through a fire—they were all drawn out of shape, the colors had all run in them and they were all discolored and puckered up.

Q. Exhibit No. 61 is for some straw boards and paper.

A. That was destroyed entirely—turned into pulp.

Q. Exhibit No. 63 for some cartridges: State what those were.

A. They were destroyed. They were blank cartridges for use on the stage to make wild western noises with, and they were destroyed.

Q. Exhibit No. 66: That is for toilet paper.

A. That was destroyed; that was pulp.

Q. Now, Exhibit No. 71; there are a number of items in that for lumber and sash and glazed sash.

A. The sash were destroyed; the lumber was badly damaged and warped; it was all kiln-dried, and the loss on the lumber was about fifty per cent damage; it was all kiln-dried, finished lumber, cut to lengths, and it was all warped and used up so you could not hardly use it at all. Besides the windows

(Testimony of A. G. Lane.)

that are mentioned there were thirty-two weights that were a total loss and there were transom and other odd sash amounting to $37.45 that were a total loss, and the finishing lumber, the piece stuff, was damaged about fifty per cent; the sash broke and the glass all came apart.

Q. I show you Exhibit No. 72 and ask you in what condition the goods mentioned in that arrived?

A. This is the package that I spoke of that was a total loss. That was a crate of stuff that set close to the fire, groceries and cooking utensils, such things as that. It was crated up and it was a total loss; the soap run into the tea, and yeast got into the coffee, and they were all mixed up with the tin pans.

Q. Exhibit No. 73 for some tents or canvas of some kind.

A. This is a big tent. Those tents were damaged about—well, one of them, the thirty-five by a hundred and twenty-five, was damaged about fifty-five per cent, and the other one about thirty per cent. The big tent had probably a hundred holes burned in it. When it was folded in a roll there had been a spot of fire eat through it, and when we spread it out there was probably a hundred holes two inches in diameter. That was the big tent. The smaller tent was only stained and disfigured by discoloration.

(Testimony of A. G. Lane.)

Q. I show you Exhibit No. 75 and ask you what conditon those were in when they arrived. Those are poker chips, are they not?

A. They are chips. They were destroyed; they were celluloid poker chips; they were all stuck together and soiled and spoiled.

Q. I show you Exhibit No. 76 and ask you the condition those goods arrived there in. You will notice they contain some roulette wheels and also a writing desk and some lumber.

A. The roulette wheel, Hazzard table and faro layout, and the round tables and the Klondike and the stud were practically a total loss, and the writing desk was damaged about, oh, at least sixty per cent. It was all to pieces; the top came off of it, and the veneering came off of it, and the drawers were all stuck and the front came off. The suite wheel and the box and layouts for the same was a total loss. I don't recall about that lumber; I think that was some extra lumber to make similar tables and wheels and so forth. I don't know the condition that was in; I don't recall ever having seen it, but all these made-up gambling tables, when they were uncrated, they just fell to pieces, the veneering all came off of them, and the green baize was discolored and spoilt by the action of the water, and the glue came out of them,

(Testimony of A. G. Lane.)

and they just fell to pieces. They were warped so you could not replace them, put them together again.

Q. Exhibit No. 79, a bill of lumber from Rolph & Shroder.

A. Well, that was all kiln-dried stuff. Some of it was used in the manufacture of some of these articles that have been heretofore enumeratd and some of it was taken to Nome for other uses.

Q. Can you separate the items that were taken there and not used up there in the manufacture of other stuff?

A. No, I could not. For instance, where they would say eight feet of cedar or sixty feet of redwood, I couldn't tell now whether that was used or whether that was taken up there; but that class of goods is all kiln-dried stuff, and such of it as was not manufactured would have been damaged anywhere from thirty to fifty per cent—by warping and swelling and becoming soaked with moisture; but I could not segregate the articles to save my life at this time.

Q. Exhibit No. 80: I will ask you in what condition those goods arrived at Nome?

A. This was damaged about fifty per cent; the paint was off of it and the gilding and it was warped and softened so it bent all out of shape.

(Testimony of A. G. Lane.)

Q. I show you Exhibit No. 82 and ask you to state what condition those goods arrived in, if you know.

A. Well, I can't recall this identical piece or brand, but all that class of stuff, as a rule, was practically a total loss. All that laid up gambling stuff. I think there was one chuck-a-luck outfit that was down in a case that was not damaged so bad, but whether this would be the one or not I could not state. There was one of them I know that came out, so all it needed was a little fixing so it was all right.

Q. Exhibit No. 83: State what condition those goods arrived in.

A. They were destroyed—two glass bookmaking layouts, they were a total loss.

Q. Exhibit No. 84.

A. Roulette wheel; that was a total loss.

Q. Exhibit No. 85, some dice.

A. Well, this is another case where you can't discriminate. The dice, as a rule, were destroyed. They were made of celluloid, a composition, and the heat and moisture destroyed them; but as to any particular ones, you can't tell.

Q. Exhibit No. 86; I will ask you in what condition those arrived in.

A. These were destroyed. They were check trays lined with green baize, and they were warped and soaked and spoilt.

(Testimony of A. G. Lane.)

Q. Exhibit No. 87 for some more dice, so Mr. Malloy testified.

A. As I stated, I could not say what condition any particular bunch of that dice was in. It was all practically destroyed, although there might have been a few pieces of them that came out whole, but as a rule they were all destroyed. It was all made of the same kind of material and destroyed in the heat and steam.

Q. Exhibit No. 88 for some shears; state what condition they arrived in.

A. Well, they were damaged about forty or fifty per cent by rust and incrustations on them. They were shears for cutting cards and tickets.

Q. (Mr. POWELL.) Are those shears for cutting cards to cut the whole deck or just part of a deck?

A. You can cut about a third of a deck at a time.

Q. (Mr. BRINKER.) I show you Exhibit No. 89. State in what condition those goods arrived.

A. Twelve dozen faro playing cards; they were destroyed.

Q. I show you Exhibit No. 90 for some card cases.

A. I don't know as to what condition they were in.

Q. I show you Exhibit No. 91, another bill of dice. I think Mr. Malloy said they were dice.

(Testimony of A. G. Lane.)

A. Well, if they were dice, they were destroyed.

Q. I will show you Exhibit No. 92 for another bill of dice.

A. Well, if these were dice they were destroyed; but there is only part of this bill for dice—twenty-two dollars and a half for dice, and a hundred and twenty dollars for checks—three thousand checks here, and they were destroyed.

Q. (Mr. POWELL.) Were those checks made of celluloid?

A. Some celluloid and some paper. A check that would be an eighth of an inch thick, when it came out of the box would be half an inch—the heat would swell them right up.

Q. Exhibit No. 93: I will ask you what condition they were in.

A. This Exhibit No. 83, 18 set of dice; they were destroyed and two roulette balls were destroyed, and spotted ivory Hazzard dice were destroyed and bird's-eye dice were destroyed; the two new roulette layouts, I don't know anything about, nor the Hazzard layout, nor the ash circle burnt Klondike layouts. They are small things and were packed in a box and I don't recall seeing them; I don't know what condition they were in.

Q. I show you Exhibit No. 94, which is for an-

(Testimony of A. G. Lane.)

other lot of dice, though it is not specified in the exhibit, but Mr. Malloy said it was dice.

A. Well, if they were dice they were destroyed. I didn't see all the dice that came out. I know all the dice we took up there were destroyed.

Q. Exhibit No. 95—knocked-down crap table: I will ask you in what condition that arrived at Nome.

A. I don't know what condition that was in. I can't recall anything about it. I know we had two knocked-down crap tables and two or three that was put together, but I don't recall in what condition those knocked-down tables was in.

Q. Now Exhibit No. 96 is a voucher from F. G. Peterson for $227.50. Part of it is for tables and part of it is for repairs upon tables bought from Considine and Greening.

A. I know he worked up there in the ship, and I know he put the tables together, but I don't know anything about the time he put in on the tables or anything about it.

Q. Can you tell about the tables, what condition they arrived in?

A. Well, all the tables—all the made up gambling tables—were practically destroyed. They warped and split and the glue came out of them and the cloth that they were covered with became soaked and the glue unfastened and curled up and they were practi-

(Testimony of A. G. Lane.)

cally destroyed, and the timber was of such character that when it warped you could not warp it back to place again and it was shaped already so it could not be repaired.

Q. I will show you exhibit No. 97 which is a receipt from Maddow to J. W. Considine in which Mr. Malloy testified was for part of the purchase price of the stage wardrobe.

A. Well, that was that trunk and hamper.

Q. Yes; there is another one in here—

A. No; I don't know anything about the correctness of this account.

Q. No, I am just asking you about the condition the stuff arrived in.

A. Well, the stuff was practically ruined; the tights were ruined.

Q. I show you Exhibit No. 104. That was a different shipment, but the same class of goods.

A. No, in connection with this there is an item in that statement of mine of thirty-five dollars for freight charges. This is the hamper wardrobe and the trunk. Now, we had a bill for the express charges and the return money charges, but the bill has become lost and my recollection is it is thirty-five dollars and I have got that item in that bill. In looking over the accounts with Mr. Malloy I dis-

(Testimony of A. G. Lane.)

covered that there was no express bill for those items and we went and tried to get one and they send their books at the end of the year to New York or to the head office—it is almost impossible to get a duplicate.

Q. Now, Exhibit Nos. 97 and 104 are the receipts that were given for the purchase price of those wardrobes that were in this hamper and trunk?

A. Yes.

Q. Now, can you state the condition those wardrobes arrived in?

A. Well, the wardrobes are practically ruined, particularly those that were in the hamper. It was a big basket, probably four feet long and three feet square and the stuff in that was ruined entirely, and the stuff that was in the big trunk was almost ruined —it was in pretty near as bad shape as the hamper. So the silk tights and fancy fringe and furbelows that were used for decorating characters on the stage in making up Prince Charming and Cinderella and so forth, they all run together and stuck together and were puckered and stained so they were practically useless.

Q. I show you Exhibit No. 100 for some billiard cloth and ask you to state what condition that arrived in?

(Testimony of A. G. Lane.)

A. I don't know. That was in one of the safes and I saw the bundle, but I never saw it opened. It was green cloth and covered billiard-tables.

Q. No. 103 is a bill from Baker & Richards company. What condition did those goods arrive in?

A. That stuff did more damage than the fire did. That is some of the color that melted and run down through the goods in the hold of the ship. It was water colors, gypsum and stuff of that kind to make white-wash.

Q. Was that ruined?

A. It was total loss and it destroyed everything around it.

Q. Exhibit No. 105 is for some printed matter from the Ballard Union?

A. That was destroyed.

Q. Exhibit No. 106 which I will now show you, appears to be for cheap revolvers.

A. It is two revolvers, six dollars is the whole amount. They were damaged at least fifty per cent. The cylinders stuck and were all rusted and practically ruined. They could have been fixed up, I guess, but they were not worth it.

Q. Exhibit No. 108, what condition did that arrive in?

A. Oh, that was damaged about thirty per cent. It was manila rope, and it would not run through the pulleys that it was intended for.

(Testimony of A. G. Lane.)

Q. Exhibit No. 109, a lot of printed door checks.

A. They were destroyed. They were pasteboard door checks.

Q. Exhibit No. 110 is a lot of printed matter.

A. They were destroyed—all the paper and pasteboard and printed stuff was all destroyed.

Q. Exhibit No. 113, what condition did that arrive in?

A. Oh, these were brass checks; they were all discolored and stuck together, they were destroyed practically.

Q. Exhibit No. 115: I will ask you what condition those good were in?

A. I don't remember. That was a rifle and revolver; that was in a case that I never handled.

Q. Exhibit No. 116; that was for a lot more of that finishing lumber?

A. Well, that was damaged about thirty or forty per cent—thirty-five per cent. It was all kiln-dried stuff, all cut to certain lengths and sizes, and it was warped and twisted and swollen.

Q. I show you exhibit No. 117, which appears to be for some hardware, and ask you what condition that was in.

A. That was damaged about forty per cent. It only amounts to eighty-five cents altogether.

(Testimony of A. G. Lane.)

Q. Here is exhibit No. 118, part of which is for wharfage, fifty-five cents, and the balance for goods. State what condition that arrived in.

A. I don't know anything about this Exhibit No. 118.

Q. Exhibit No. 119: What condition was that in?

A. Why, the chamois skins and the chamois skin sacks that we were going to bring the gold back in was all soaked and destroyed; the drilling was damaged about fifty per cent; the carpet sweeper was damaged about fifty per cent.

Q. Now, here is Exhibit No. 121 for combination stove. I think you testified about that before, but I don't remember that you gave an estimate of the amount of damage.

A. It was damaged about fifty per cent. It was a combination cooking and heating stove worth forty dollars.

Q. Exhibit No. 122: Some dice.

A. They were destroyed.

Q. Exhibit 123 is for some dice.

A. They were destroyed likewise.

Q. Exhibit No. 125 is another bill from Baker-Richards & Company.

A. That is something I don't know anything about. Peterson got that stuff for his tables—en-

(Testimony of A. G. Lane.)

ameling his gambling tables and one thing and another—to take up there to put them up with.

Q. Now I show you Exhibit No. 126 for identification; that has not been introduced in evidence yet.

A. With the exceptions of the muslin, calico and cheese-cloth that was all from MacDougall & Southwick, for which there is a separate voucher in here, these items are purchased at different times during the months of April and May and got bills for them and the bills were put in and sent to 'Frisco and lost, at least in going through these vouchers I discovered there was none there for these various articles, and I have made out this statement from memory.

Q. You know that those items were all purchased, do you?

A. Yes, all those things.

Q. And you know that the freight bill there mentioned was paid by you?

A. Yes. That was on that hamper, wardrobe and trunk, that hundred and forty-two dollar lot that was expressed from Chicago.

Q. And for whom was it paid?

A. I didn't pay this, Brooks paid this, but I knew at the time the amount. I put it down at thirty-five dollars, but I am sure it was thirty-seven dollars

(Testimony of A. G. Lane.)

and a half, because it came to me with the card—he was the secretary for the People's Theater and done considerable business for us—and he came to me with the card or notice that the goods were at the depot for us and I was very busy and asked him if he would go down and get them and pay for them. I was satisfied the expressage would be considerable, and he took them up in an express wagon and I O. K.'d the voucher and he went to Malloy, and got the money on them. I am satisfied it was $37.50, but I put it down $35. I know that was paid. That was for the Standard Theater Company, that was these wardrobes.

Q. Now, the goods mentioned there, do you know who they were purchased for?

A. For the Standard Theater Company.

Q. Were they paid for by the Standard Theater company?

A. Paid for by the Standard Theater Company and went to Nome and were destroyed.

Q. What condition did they arrive in?

A. They were destroyed practically. Some of this life net in here was not damaged to amount to anything; it cost twenty-four dollars, but if it had been put in use probably the damage would not have amounted to more than four or five dollars on it. It was a life net to stretch under for aerial work. Out-

(Testimony of A. G. Lane.)

side of that the rest of these goods were practically a total loss.

Q. Well, the life net, what was its damage?

A. Well, it was damaged about four or five dollars probably.

Q. It would be damaged then about four or five dollars, about one-sixth, would you say?

A. Yes, about one-sixth or about twenty per cent —sixteen and two-thirds per cent. These bladders were destroyed and the carnival masks were destroyed and the Jap parasols and screens and the flag stuff—I bought a hundred yards of red, white and blue bunting and a flag at MacDougall & Southwick's and wrapped them all up together and the colors run in the flag and destroyed the bunting—destroyed both of them. The flag was nine dollars and the hundred yards of bunting at six dollars. It was a fifteen dollar bill, that was a separate item entirely.

Q. Then you have erased from this exhibit No. 126 the item in Exhibit No. 2?

A. Yes, I have erased the item for which there is a separate voucher which I had overlooked.

Cross-examination.

Q. (Mr. POWELL.) Now, Mr. Lane, you testified in regard to the goods shown by Exhibit No. 103

(Testimony of A. G. Lane.)

that they melted and run down through other articles, causing a great deal of damage.

A. Well, for instance, that gypsum is thin, you know kalsomine all comes in paper packages and the steam and water soaked the packages and the stuff became liquid and that is one thing that caused a good many of the conditions I mentioned in the other goods—the stuff percolated down through them.

Q. And discolored them?

A. Yes. There is a package of blue enamel in there, it is much like black, only it is blue.

Q. You spoke about this crate of kitchen utensils: What was in that?

A. A full kitchen outfit was in there and canned groceries and everything that we was going to have for our own private use in our own private kitchen—everything was in that crate—and that was damaged by the fire more than anything else.

Q. You say the windows and transoms were a total loss? A. Yes.

Q. How were they injured?

A. They were glued down at the corners and the water soaked the glue out and the moisture soaked them up so they burst out of the ——— and they just fell to pieces in many cases.

Q. Now, what about this stuff in hampers.

(Testimony of A. G. Lane.)

A. It was discolored; it was manufactured silk tights, and where the seam was it would shrink, and where there was no seam it would not, and they came out in a mess—just seemed soaked like they had been in the bottom of the ocean for thirty days.

Q. Could those gold scales be used?

A. I think that the main body of them, the big brass arms and pans, I think they were cleaned up and some little use made of them, but the little trivial parts, all the chains and such parts, were all corroded, so I don't think fifty per cent would be an excessive figure to put the damage at.

(Testimony of witness closed.)

Mr. THOMAS J. CONSIDINE, produced as a witness for and on behalf of libelant, having been first duly cautioned and sworn, testified:

Q. (Mr. BRINKER.) Can you state what the arrangement was with Jenkins for painting the scenery and drop curtain and so forth?

A. You mean the contract price?

Q. Yes. A. Seven hundred dollars.

Q. And was that the amount that was paid to him for painting that scenery and so forth?

A. That was the amount, yes.

Q. And that scenery all went in this cargo, did it?

A. It all went in this cargo, yes, sir.

(Testimony of Thomas J. Considine.)

Q. You know that the whole seven hundred dollars was paid to him, do you? A. Oh, yes, sir.

(Testimony of witness closed.)

And thereupon, by consent, an adjournment was taken to 10 o'clock Thursday morning, January 19, 1905.

Seattle, Washington, 10 A. M.
Thursday, January 19, 1905.

Present: Mr. W. H. BRINKER, for Libelant.
Mr. JOHN H. POWELL, for Respondent.

Continuation of proceedings pursuant to adjournment, as follows, to wit:

Mr. F. G. PETERSON, recalled as a witness for and on behalf of libelant, testified:

Q. (Mr. BRINKER.) I want to ask you about some of the exhibits that have been introduced in evidence and about which you did not testify, as I recall, as to the amount of damages. I will first ask you as to Exhibit No. 9, which is for a lot of stage hardware. Now, do you remember these goods? A. Yes.

Q. What condition did they arrive in at Nome, if you know?

A. Well, I would say they were damaged about fifty per cent.

Q. By what?

(Testimony of F. G. Peterson.)

A. This is all hardware—mostly—and from water and steam—rusted up.

Q. Now, I call your attention to Exhibit No. 11 for a lot of Standard Theater tickets and printed matter. A. That was a total loss.

Q. All that printed matter was ruined, was it?

A. Pretty near all of it.

Q. I call your attention to exhibit No. 14, which is a bill from the Golden Rule Bazaar for dusters, dust pans and so forth. State if you know, what the condition of those things was when you arrived there.

A. That must have been about seventy-five per cent damage.

Q. Now, I call your attention to Exhibit No. 15 which is for a lot of rubber stamps and pads and ink and brush and so forth.

A. That was a total loss, the rubber stamps and things.

Q. I call your attention to Exhibit No. 16 for a lot of printed tickets, wine lists and perforated blanks and so forth.

A. Well that is the same as the other.

Q. That was a total loss, was it? A. Yes.

Q. I call your attention to Exhibit No. 38, which is for a lot of traps. A. They was also ruined.

(Testimony of F. G. Peterson.)

Q. I call your attention to Exhibit No. 39 which is for twelve pairs of blankets and some oilcloth bought from the MacDougall Southwick Company.

A. The oilcloth was all ruined; the blankets, I remember we had one pair that was burned up—not exactly burned up, but burned some; the rest was—well, I should say about fifty per cent.

Q. The blankets about fifty per cent?

A. Yes, that would be about what it was.

Q. And the oilcloth?

A. That was all ruined. It was stuck together—no good at all.

Q. I call your attention to exhibit No. 41 which is for ten cases of Manitou Mineral water. I will ask you if you know what condition that arrived in?

A. Well, I think I put that at fifty-five per cent; that was case goods.

Q. I call your attention to Exhibit No. 54 which is for two barrels of California brandy, some port and sherry, one barrel of Reisling, one barrel of claret and ten kegs of claret: what condition did those goods arrive in?

A. Well, those barrel goods, I thought it would be about twenty-five per cent.

Q. On the barrel goods?

A. And the case goods, of course that was all mostly ruined—all ruined really—broken.

(Testimony of F. G. Peterson.)

Q. I call your attention to Exhibit No. 59, which is for a lot of crash, I suppose for toweling, and six dozen aprons and six dozen towels and four dozen towels, from Baillargeon & Company. Do you know the condition those goods arrived in there?

A. Yes, I know what the condition was. I put it fifty per cent, I think that would be about right. It would be second hand stuff, you know—about the same as second hand.

Q. Now, I call your attention to Exhibit No. 60, which is for two pairs of tights and ask you if you know what condition they were in when they arrived there?

A. Well, they was a total loss.

Q. I call your attention to Exhibit No. 61, which is for some straw board paper.

A. That was ruined.

Q. And Exhibit No. 62 is for marlin twine, as I understand that. What condition was that in?

A. I would put that at fifty per cent.

Q. And I call your attention to Exhibit No. 63 which is for five boxes of cartridges, 38 Smith & Wesson cartridges, which some of the other testimony shows to have been blank cartridges for use on the stage. What condition were those in?

A. I don't think I would attempt to use them; I would put them at a hundred per cent.

(Testimony of F. G. Peterson.)

Q. I call your attention to Exhibit No. 73 which is for two tents, one is a tent twenty-four by sixty-six by six and the other is a tent thirty-five by a hundred and twenty-five by nine, both of them large walled tents and having an extra partition in the long tent.

A. I estimate that at fifty per cent.

Q. Fifty per cent damage on all that?

A. Yes.

Q. I call your attention to Exhibit 79 which is for a bill for finishing lumber and so forth from Rolph & Schroder.

A. I will say fifty per cent on that. From the water and steam and everything—everything was black, it ruined the hardwood and dogwood, it was all ruined.

Q. State whether this was kiln-dried lumber for finishing lumber?

A. Finishing lumber, the hardwood, you know.

Q. What effect would water and steam have on that?

A. It would make it black and everything goes right through it, you know, and the wood takes it right in. It would be dark color clear through.

Q. I call your attention to Exhibit No. 80 which is for three pieces of grill work, costing twenty-five dollars, from the Washington Wire Works Company.

(Testimony of F. G. Peterson.)

A. Yes, I had that made myself. I just made that fifty per cent.

Q. Now, that is all of the old exhibits about which you were not examined before, as I recollect it. Now, there are a lot of new ones here that I want to ask you about that have been introduced since your testimony was given before. The originals of these exhibits, so Mr. Malloy testifies, were sent to the adjusters down in San Francisco, and were never returned, and these have been substituted for those originals. I call your attention to Exhibit No. 82 which is for a chuck-a-luck layout and four dozen and four bookmaking balls, and also for six best leather Klondike boxes, and ask you to state, if you know, what condition those arrived in.

A. They were all ruined.

Q. And I call your attention to Exhibit No. 83 which is for two glass bookmaking layouts.

A. They were all spoiled.

Q. They were ruined, also? A. Yes.

Q. I call your attention to Exhibit No. 84, which is for a roulette wheel and a layout, cost a hundred and seventy-five dollars. In your former testimony your attention was called to two roulette wheels, which was purchased from Groute & Company of New York. A. Yes, sir.

(Testimony of F. G. Peterson.)

Q. And this was purchased from the Standard Club. Now, what condition was that in when that arrived?

A. It was not damaged as badly as the other, it could be fixed up and used. I would state that to be fifty per cent damage.

Q. I call your attention to Exhibit No. 85, which is for three sets of crap dice, cost five dollars.

A. Well, all the dice were ruined.

Q. I call your attention to Exhibit No. 86, which is for a chuck-a-luck tray, bookmaking tray, poker trays, curved racks for Twenty-one game, total amount of the bill is $72; that seemed to have been sold by you to the Standard Theater Company. Now, what condition did those arrive in, if you know?

A. They are covered with billiard cloth and that was all loose and off, so that it was not worth a whole lot—well, say seventy-five per cent.

Q. How were they put together—glued?

A. They were glued right together, you know, and then billiard cloth goes right on the face, you know.

Q. And what effect did it have on them?

A. They all came apart. I fixed up some of them.

Q. Now, Exhibit No. 87, Mr. Malloy testified was for some dice; it does not appear on the face of it

(Testimony of F. G. Peterson.)

what it was for; it is a bill from George Mason & Company.

A. All the dice were ruined.

Q Now, I call your attention to Exhibit No. 88, which is for one trimming shears and card cutter, sold by the Standard Club to the Standard Theater Company. What condition did they arrive in, if you know?

A. Well, they were ruined for that purpose.

Q. I call your attention to Exhibit No. 89, which is for twelve faro cards; what condition did they arrive in?

A. Well, they were also ruined.

Q. And I will call your attention to Exhibit No. 90 which is for two card cases; these are card cases in addition to those you sold to the company.

A. These card cases I would put at fifty per cent.

Q. Exhibit No. 91 is another invoice for dice; you say they were all ruined? A. Yes.

Q. Exhibit No. 92 is also for a lot of dice, amounting to $142.50. That you say was ruined, also?

A. Yes.

Q. Exhibit No. 93 is for a lot of dice and roulette balls and three broadcloth faro cloths and two ask circle, burnt in, Klondike lay-outs.

A. Well, they were all ruined except the roulette balls; they were not ruined.

(Testimony of F. G. Peterson.)

Q. The twenty-four roulette balls cost $12; what condition did the balls arrive in?

A. Well, I couldn't say; you know they was ivory and they had not been in the fire and I could not say what they would be. Of course an ivory ball—I don't know, the steam might have some influence on it to make it untrue, that I don't know. A person can't tell without he tries it. I can't remember about it at all—when they were used. They might have been ruined at that, I don't know.

Q. Exhibit No. 94 is for another invoice of dice: That you say was ruined. A. Yes.

Q. Exhibit No. 95 is for a knock-down crap table; that appears to be made to order by you for the Standard Theater Company? A. Yes.

Q. What condition did that arrive in?

A. Well, the glue was all loose in it—I would put it worth seventy-five per cent, that is all.

Q. Now, Exhibit No. 96 is an invoice of some crap tables and also for work that you did upon certain other tables. Now, what condition did those arrive in, as you remember, if you can remember about them?

A. Well, of course the cloth was stained and they was apart and all this, but I would put them at fifty per cent.

(Testimony of F. G. Peterson.)

Q Did you do any repair work on those after you got there?

A. Yes, some of them. Some of them I did not really use—it is hard to tell.

Q. You estimate the damage, then, at fifty per cent? A. Yes, about that.

Q. Exhibits Nos. 97 and 104 are bills from Alberni, of Chicago, for stage wardrobe; they were packed in two big hampers, as I remember the testimony of other witnesses.

A. I have testified to that before, but anyhow that was a hundred per cent. You will find that in my affidavit.

Q. Well, you say now it is damaged a hundred per cent. A. Yes.

Q. Exhibit No. 100 is for billiard cloth purchased from A. H. Harrison & Company, amounting to $48.50. Do you remember that? A. Yes.

Q. What condition did that arrive in?

A. It was about the same condition as my own—it was all ruined.

Q. You had some billiard cloth along, too.

A I had three hundred and fifty dollars' worth of dice and billiard cloth up there and every dollar of it was ruined.

Q. I call your attention to Exhibit No. 103, which

(Testimony of F. G. Peterson.)

is for some gypsum, glue, enamel and Japan, or appears to be. Do you remember that?

A. Yes, I remember that all right. Put that at twenty-five per cent.

Q. At twenty-five per cent?

A. I don't know whether that is right or not. We had lots of that stuff and it busted loose and enamel, whenever the air gets to it, it is spoiled, but there is a whole lot of more bills of it.

Q. Exhibit No. 105 is for a lot of printed matter from the Ballard Union, amounting to $25.25. Do you remember what condition that arrived in?

A. All the paper and all that kind of stuff was all ruined.

Q. Exhibit No. 106 which I call your attention to is for two revolvers, one two dollars and the other for Considine brothers, four dollars. Do you remember those stage revolvers?

A I don't remember them at all. I never seen them, I don't think.

Q. I call your attention to Exhibit No. 108, which seems to be for some manila envelopes. Do you remember those envelopes?

A. I don't know whether I remember those or not, but I remember some envelopes that were spoiled by the fire.

(Testimony of F. G. Peterson.)

Q. And Exhibit No. 109 is for a lot of printed door checks, as I understand it, from the Globe Ticket Company. Do you remember what condition they arrived in? A. They were all ruined.

Q. And Exhibit No. 110 is for a lot of perforated blanks and tickets and tabs purchased from the Ballard Union.

A. That would be the same condition.

Q. I call your attention to Exhibit No. 113, which is for a lot of checks purchased from Joseph Mayer & Bros., of Seattle. The testimony was that they were bar checks. What condition did they arrive in, do you know?

A. I don't know as they were spoiled any, I can't say they were spoiled. Of course they had to be cleaned up and shined up, that would be all.

Q. They were tarnished, were they?

A. Of course they were tarnished.

Q. How much did that injure them?

A. I would state about twenty-five per cent, I think that would be about right.

Q. Cost that much to put them in condition again, would it?

A. Well, I don't know, I guess it would up there.

Q. I call your attention to Exhibit No. 115, which is for a Cosmic Bamboo fishing-rod and two revolvers and Marlin rifles. I think perhaps you testified

(Testimony of F. G. Peterson.)

about these in your original testimony, but we did not have an invoice of them.

A. Well, I know it is in my testimony. I have testified to that already.

Q. Exhibit No. 116 is for some lumber purchased from the J. S. Brace Company, it seems to be finishing lumber.

A. I can't testify to that at all. I didn't buy the lumber.

Q. Exhibit No. 117 safe keys and locks.

A. I put that at fifty per cent. It was all rusted.

Q. Exhibit No. 18 is for a bottle of stamping ink and so forth. Do you know what condition they arrived in? A. I don't remember.

Q. Exhibit No. 119 is for four chamois skins, twelve chamois sacks, one dozen drilling sacks, indelible lead, carpet sweeper, and for some labor.

A. I would put that at fifty per cent.

Q. Of all the goods?

A. Those chamois skins were all ruined, really.

Q. I call your attention to Exhibit No. 121 for a combination stove. A. That I testified to.

Q. I call your attention to Exhibit No. 122, which is for some dice. You have testified to that. Exhibit No. 123 is for some more dice; that is a hundred per cent, you say? A. Yes.

(Testimony of F. G. Peterson.)

Q. Exhibit No. 125 is a bill from Baker Richards & Company, total $6.20, consisting of LaPage's glue, varnish, wood alcohol and so forth.

A. I estimate that all through at a hundred per cent, because it was ruined.

Q. Exhibit No. 126 is for some goods purchased by Mr. Lane, among other things it includes forty bladders purchased from Frye, Bruhn & Company to be used on the stage.

A. That is also in my affidavit.

Q. I can't find that you testified about it, so I will ask you about it. Forty bladders purchased from Frye, Bruhn & Company some carnival masks and other things—you can look at the exhibits.

A. I have testified to those bladders and that was a hundred per cent—all that stuff was ruined except the lanterns, and the lanterns I would put at fifty per cent.

Q. How about that life net?

A. I don't remember that at all.

Cross-examination.

Q. (Mr. POWELL.) Now, Mr. Peterson, you have testified that the goods shown by Exhibit No. 14 had been damaged seventy-five per cent; those goods consisted of a duster, whiskbrooms, dust pans, counter brushes, window cleaner and scraper and a

(Testimony of F. G. Peterson.)

wash brush. Now, what was the condition of those goods?

A. I think some of them, if I remember right, some of those brushes was burned some.

Q. Now, you have testified that the rubber stamps —rubber goods, brushes and so forth that were purchased from George M. Vass & Company—you testified those were all ruined? A. Yes.

Q. What ruined them, heat?

A. Yes, heat and steam ruined that stuff.

Q. Heat would not have any effect on it itself, would it?

A. Well, the heat—well, I don't know, with hot steam, I can't say what it would do

Q. Well, it was the heat that did the damage, wasn't it?

A. Oh, it was the heat—steam, you know, is an awful heat in itself.

Q. I understand, but it is the heat of the steam and not the dampness of the steam that hurts the rubber goods?

A. Oh, that would be the heat, you know. It can't be the dampness at all, no, sir.

Q. Now, you testified that some leather straps shown by Exhibit No. 38 were entirely ruined. What was the condition of those straps?

(Testimony of F. G. Peterson.)

A. Well, that was from the heat, too, you know. As I told you before, all leather goods was ruined from the heat.

Q. I understand, but what was the condition of the leather, was it all brittle and crumpled up—scorched or what?

A. Well, I guess it was scorched too, at that. I couldn't say it was.

Q. What was the matter with the Manitou water?

A. Well, the bottles, most of them, was broken to pieces.

Q. That was case goods, was it not?

A. Yes, sir.

Q. And did those case goods show any evidence of having been near the fire—were they scorched any?

A. No, I don't think so. We found lots of champagne was scorched, but these I don't think was scorched any.

Q. You don't remember? A. No.

Q. Now, these barrel goods of brandy, port, sherry wine and so forth, shown by Exhibit No. 54; you testified that was damaged about twenty-five per cent. Now, in what did that damage consist?

A. Well, it showed the heat had opened it and it seems to be lost, a whole lot of it, that is the idea.

Q. That was barrel goods? A. Yes.

(Testimony of F. G. Peterson.)

Q. Some of those barrels had been close enough to the fire to get scorched?

A. No, there was not any of them, I don't think. No, there wasn't any of the barrels that I ever noticed that were scorched any.

Q. But it had just got hot enough so some of these goods leaked out? A. Yes.

Q. Now, this crash, aprons, towels and so forth that were purchased from Baillargeon, as shown by Exhibit No. 59, what was the matter with those goods when they arrived at Nome?

A. Well, it seems so they got out some way and was open, and I remember well, because we boys was saying we would use them for wiping waste, but they was dirty and we didn't use them, that's all.

Q. Smoke?

A. Smoke and every other thing; yes.

Q. Well, couldn't they have been all right if they had been washed?

A. Well, we didn't wash them. I don't know as they would or not. No, I think not, because you could find strings on them, you know, that were thoroughly black. I don't think you could, but that I wouldn't say, because it might have been such a thing; I don't know.

Q. Now, what about these two tents you spoke about?

(Testimony of F. G. Peterson.)

A. They were both also dirty and stringy and every other thing, so I thought there would be just about fifty per cent damage on them.

Q. Were they burned any? A. No.

Q. Neither of them?

A. No, they were not burned any.

Q. They could be used, could they not, as tents, all right?

A. Well, yes, we used one of them, I remember.

Q. Well, you could have used the other one, could you not, if you had put it?

A. Oh, I suppose it could have been used.

Q. All that was the matter with it, was it not, it was marked up, or discolored some?

A. Yes. I considered it was something like a second-hand tent, you know, that was all. I think it could be used, yes.

Q. Now, you spoke about those goods that you purchased from Rolph & Schroder as shown by Exhibit No. 79, and I believe you testified those goods had been damaged fifty per cent? A. Yes.

Q. They consist of finishing lumber of one kind and another, evidently? A. Yes.

Q. How was that damaged?

A. Well, you know this was all nice, dry lumber —kiln-dried—and when it gets into steam it would curl right up, you can't do anything with it.

(Testimony of F. G. Peterson.)

Q. That is what I want to understand; it was twisted out of shape, was it?

A. Yes, sir, sure, and also discolored, you know, because it goes right into the pores, you can never get it very white any more.

Q. How about this grillwork?

A. That was rusted.

Q. That was iron work, was it?

A. Yes, and it was gilded, and that had all come off, and it was rusted. I fixed it up again and they used it, but it was an awful mean job to get it cleaned up and enameled again.

Q. You testified this chuck-a-luck outfit and the four dozen and four bookmaking balls as shown by Exhibit No. 82 were entirely ruined?

A. Yes, sir.

Q. What was the condition of that chuck-a-luck layout?

A. Well, the chuck-a-luck lay-out is painted, you know, with oil paint, about a six-inch letter painted in gold letters and painted with oil paint, all along an oilcloth, and you know when it comes to heat like that it is all ruined; it sticks together, you never can open it up.

Q. It was ruined by the heat?

A. Yes, sure. The steam or water will find it out, you know.

(Testimony of F. G. Peterson.)

Q. What happened to the bookmaking balls?

A. The bookmaking balls is celluloid, you know, and everything of that kind, they are all celluloid.

Q. Now, what was the condition of the glass bookmaking layout, as shown by Exhibit No. 83?

A. They were broken up, one of them—they were both really broke—one was broken, a corner broken off, and the other one broke to pieces and the letters melted off.

Q. The heat had broken the glass?

A. I couldn't say whether the heat broke it or in any other way—I don't know.

Q. What was the matter with this roulette wheel which had been purchased from the Standard Club, as shown by Exhibit No. 84?

A. It was all soaked apart, you know, and some of the veneer got off of it and the numbers was off—had to be done over, that is all.

Q. Damaged by smoke?

A. No; that would be the water what ruined that.

Q. Now, these dice you speak about, they had become so hot they had lost their shape.

A. Then the hot steam would do that, you know.

Q. We are not speaking about that now. What was the shape of them?

A. Quarter of an inch dice would be three-quarters of an inch long—all out of shape. Celluloid will

(Testimony of F. G. Peterson.)

take no heat, you know; they were not melted, but they had gone out of shape.

Q. Referring to Exhibit No. 86, which is for a chuck-a-luck tray and bookmaking trays and poker trays and curved racks for craps and curved racks for the game of Twenty-one, which were all made by you—now, did you see those goods when they arrived in Nome? A. I did, sir.

Q. What was their condition?

A. They was coming apart, they was glued together and cloth on the bottom to stand the chips on they were all coming apart.

Q. Exhibit No. 88 is for trimming shears and a round card cutter. You testified that those implements were ruined for that purpose?

A. Yes. Well, they couldn't be used for any other purpose, either, you know.

Q. What was the trouble with them?

A. They were rusted. A card shears has peculiar fancy little mechanism, and it ruined that, you know, entirely. It could not never be fixed up to cut.

Q. You testified that the card cases shown by Exhibit No. 90 were ruined, two card cases valued at sixteen dollars. What was the matter with them?

A. I didn't say they were ruined, did I?

(Testimony of F. G. Peterson.)

Q. No, damaged fifty per cent.

A. I thought that was what I said, because I fixed the card cases up and they were used. They were glued, you know, and I had to fasten them up and put them in shape. They were a fancy, polished case, you know.

Q. What was the condition of them when they got there?

A. The veneering was all ruined on them and they came apart and—

Q. What are they made of, metal?

A. No, they are mostly made of mahogany.

Q. What was the trouble with this crap table, as shown by Exhibit No. 95, when it arrived at Nome?

A. Well, it was covered with billiard cloth, and it was all off and all spoiled—the cloth, you know.

Q. In what condition was the cloth?

A. Why, the water all crumpled it up, so you can't do anything with billiard cloth when it has been wet. You can't even straighten it out.

Q. I notice a great many of these bills show purchases by the Standard Theater Company from the Standard Club. Now, those goods are all gambling paraphernalia, of one kind and another?

A. Yes.

Q. Now, those goods were used down here at the

(Testimony of F. G. Peterson.)

Standard Club before they were shipped up to Nome, were they not?

A. No. This one crap table we speak of here, that was new, never was used.

Q. I am not speaking about that, but is it not a fact that there were a great many things the Standard Club had been using that they took out of their clubhouse and shipped up to Nome?

A. No. All they got was from Considine and Harry Greene, if it is Harry Greene, from Spokane, That is all the second-hand goods they had. They didn't take any old tools out of the Standard Club at all, for they were using every bit there, and none of these were old. No, all these were new. All the old second-hand we had was what was purchased from Harry Greene and Considine.

Q. I notice Exhibit No. 96 is for a lot of roulette tables and crap tables and faro tables and bookmaker's tables, and so forth and so on. What was the condition of those goods when they arrived there?

A. Well, I think I put that seventy-five per cent. They were all to pieces.

Q. What was the condition of them?

A. They were all to pieces and the covers were all ruined—everything was ruined that was on them.

Q. Now, I call your attention to Exhibit No. 103 which is for some gypsum and light blue enamel and

(Testimony of F. G. Peterson.)

some Japan in cans. This light blue enamel is also in cans. Now what happened to that?

A. Well, it seems the pressure opened it and it run out under the lid and consequently it ruins it quick. Enamel is something that won't stand any air at all.

Q. These checks purchased from Joseph Mayer & Bros., Exhibit No. 118; were those metal checks, or celluloid checks?

A. Those were bar checks, they are a metal check.

Q. Now, what was the trouble with them?

A. Well, they were tarnished, you know.

Q. What were they made of—aluminum?

A. No; they were made of brass—they were a brass check.

Q. They used them right along, didn't they?

A. Oh, they never got to use them, you know, they never got set up. I put them twenty-five per cent, because I thought they were damaged that much. They were new goods, you know.

Q. Now, you testified that the goods purchased from Baker & Richards, as shown by Exhibit No. 125, were damaged one hundred per cent, that is, all ruined. That consisted of La Page's glue and varnish and enamel and alcohol and so forth. What condition was that in?

(Testimony of F. G. Peterson.)

A. Well, you know, varnish as soon as it leaks out, it is all ruined.

Q. Well, these cans were broken open by the heat, were they?

A. Yes. That came out on the top, you know, and the brushes; they were all entirely ruined, because they are a fine-haired brush, you know.

Q. You testified that those bladders as shown by Exhibit No. 126 were all ruined? A. Yes.

Q. What were they ruined by, the heat?

A. Well, I guess they were ruined by the heat, all right.

(Testimony of witness closed.)

(And thereupon an adjournment was taken to 10 A. M., January 20, 1905.)

January 20, 1905, 10 A. M.

Continuation of proceedings pursuant to adjournment. All parties present as at former hearing.

HARRY GORDON, recalled in behalf of libelant, testified as follows:

Q. (Mr. BRINKER.) There are a lot of exhibits which you were examined about, and I made a memorandum of those which I find you did not testify about specifically, and those I will ask you about; and the first is Exhibit No. 9; that is for stage hardware. I will ask you to examine that and state

(Testimony of Harry Gordon.)

if you can what condition those goods arrived at Nome in, and how much they were damaged, if any. I believed you stated in your former testimony that those were damaged about the same as the other hardware.

A. I intended to state in my former examination that all of the hardware was in about the same condition.

Q Can you give a specific amount of damage that that stage hardware mentioned in this exhibit suffered?

A. I do not recall what percentage I placed on them now; it is very hard to remember all those items. The damage on this portion of the cargo was from rusting, and as affecting its salable value there, the percentage would probably be at least fifty per cent of loss. The nails and the kegs, I recall, were damaged worse than any other portion of the hardware. They were practically a loss.

Q. They are in another exhibit. Now, will you turn to Exhibit No. 12, and I will call your attention to that. You did not seem to have testified specifically as to that before; that is a pair of gold scales and weights and so forth.

A. It would be impossible for me to say what the exact percentage of damage on those scales was. I recall having shown the scales to one or two per-

(Testimony of Harry Gordon.)

sons whom came there with a view of purchasing, and they declined to buy for the reason that they feared damage by reason of it being in the cargo. The value, I should say, of the scales, as conditions existed there, would be at least reduced 50%, and probably more.

Q. Now, there was, in Exhibit No. 17, I think, that you did not state what the damage was; that is for a lot of doors; you stated on page 279 of your testimony that they were damaged, but I do not think you gave the percentage of the amount of the damage nor in what particular manner they were damaged.

A. I think I testified that those stores were damaged some of them by the jarring of the crates, or the doors in the crates, rather, and that others of them the panels were swollen by reason of the moisture either from steam or water Probably a fair estimate of the damage on those doors would be 40%.

Q. I call your attention to Exhibit No. 19, which is for a lot of glue and formaline and enamel, and things of that kind. I seem to have asked you about this before.

A. Those articles and this invoice which were in cans, so far as I know, were not damaged except as they would be damaged as to their market value. The

(Testimony of Harry Gordon.)

labels on them having come off. As to the contents I could not say as to the damage. Those other articles which were wrapped in papers were in the same general condition as other drugs and so forth, and practically worthless.

Q. I call your attention to Exhibit No. 22, which is for two large sheet-iron stoves. I do not remember that you testified as to those.

A. Those sheet-iron stoves were rusted badly, as the other iron goods, and for the purpose of sale were damaged from 50 to 60%, I should say. They were in the condition of second-hand stuff.

Q. Now, I show you Exhibits numbered 25 to 29 and 30 and 31, 32, 33, 34 and 35, all for a lot of hardware from Schwabacher's, and I will ask you to state what the condition of all those was.

A. I will say generally as to this portion of those exhibits which consisted of iron goods; that they were in a rusted condition, and that the damage would be approximately the same as I have testified about in relation to the stage hardware. The sandpaper was worthless; the glue described in Exhibit No. 28 was also ruined, as was also the glue in Exhibit No. 25. I do not remember the condition of the marlin.

Q. I show you Exhibit No. 36, and I will ask you what condition those tents arrived in?

(Testimony of Harry Gordon.)

A. I have already testified as to the tents.

A. Thirty-eight is for a lot of scraps.

A. I do not remember of seeing those scraps, at least I do not recollect the damage, if any.

Q. Thirty-nine is for some cheap blankets and oil-cloth.

A. Those blankets were damaged by moisture, coming by steam or water, I could not say which; when landed they were in the condition of second-hand goods; they were practically worth 50% of their cost landed there.

Q. And the oilcloth?

A. The oilcloth was in the same condition.

Q. Now, Exhibit No. 40. You testified about the furniture and blankets, but there was a lot of cases of tinware in that that I do not remember to have asked you about. Do you remember what condition they arrived in, that is what was purchased from the Standard Furniture Company?

A. The tinware, as I recall, was purchased for the mess. That was in a somewhat bruised condition as I recall it now, when it was opened up. It could only be considered as second-hand stuff, and on sale would have to be sold as such, probably 50% of the value.

Q. Exhibit No. 41 was for mineral water in the

(Testimony of Harry Gordon.)

cases; you testified as to the other case goods, and I do not think I asked you about this.

A. I think I testified as to the mineral water, that it was a total loss.

Q. In Exhibit No. 42 you were asked about the most of the contents of that exhibit, except as to one chuck-a-luck tub.

A. The chuck-a-luck tub was in the same condition as the roulette wheels and other gambling paraphernalia of that character; the glue holding the parts together had been melted and the tub was virtually in pieces, and it was absolutely unfit for use. As it was landed it might be termed, I suppose, a total loss.

Q. Now, in Exhibit No. 46 is an item for some Victor air-tight heaters; I have not any note that you testified as to those.

A. Well, the heaters were all in virtually the same condition, and I would estimate the same percentage of loss all the way through on those; about 50%; they would pass as second-hand goods.

Q. Exhibit No. 47, which you testified about on page 283 of your testimony, but you did not state the amount of damage which they suffered; that was for some sewer pipe; you testified that they were heated and crystallized, and when the water was thrown on

(Testimony of Harry Gordon.)

them that they had cracked and flew to pieces, but I do not think you stated or estimated the damage.

A. My recollection of that part of the cargo is that about one-half of that sewer-pipe was broken, that is where it was not entirely ruined there was broken pieces out of the joints of the pipe, rendering it practically worthless. I think 50% would be a very conservative estimate of the damage on that sewer pipe.

Q. Exhibit No. 49, and in the same connection I will call your attention to exhibit No. 55; those two exhibits are for cigars; you testified as to those cigars, but as I recollect you did not state the amount of damage?

A. Those cigars, conservatively speaking, were damaged 50% of their value.

Q. Exhibit No. 53 for thirty barrels of whisky; I do not remember that you testified as to the amount of damage that that sustained.

A. I testified in relation to the whisky that I was unable to fix the amount of loss for the reason that while I was present with the company that the barrels were not gauged; I can only repeat what I said in my former testimony that there was indication of leakage from the bungs of the barrels; there was some loss, but for me to say what the approximate loss was I could not do it.

(Testimony of Harry Gordon.)

Q. Exhibit No. 59; I will ask what condition that arrived in; that is for some toweling and aprons and things of that kind.

A. Those articles was damaged from moisture and stained in some cases; the exact damage that they sustained I hardly know how to fix; unless I can estimate it on the basis for which they would sell there in the open market. Using that as a basis I can say that from forty to fifty per cent damage would be reasonable.

Q. Exhibit No. 60; I will ask you to state what condition those goods arrived in.

A. I think that those tights were included in my testimony relating to stage costumes.

Q. They were in a separate outfit; this seems to be a special order.

A. Well, I am unable to state as to the damage on those articles.

Q. Exhibit No. 61 is for some paper, and it is only ninty-six cents; that is wrapping paper I think.

A. I do not know about that paper, I do not recall it.

Q. Exhibit No. 62 is for another package of marlin.

A. That I do not recall.

Q. Exhibit No. 63 is for some blank cartridges.

A. I testified as to those, that they were wet and worthless.

(Testimony of Harry Gordon.)

Q. Exhibit No. 70 is for a lot of carpenter's tools; what condition did they get there in.

A. The tools were rusty and would simply pass as second-hand stuff. They might be used; but so far as their market value was concerned it was very much reduced. I think the same percentage of loss as to the articles in the hardware would be a reasonable estimate, about 50%.

Q. Exhibit No. 78; do you remember what condition that arrived in?

A. The poker chips were badly broken; they were a cheap class of chips and the heat affected them as that class of goods are always affected by heat.

Q. To what extent were they damaged?

A. I doubt whether those poker chips had any salable value there.

Q. Exhibit No. 79 is for a lot of finishing lumber. The evidence shows that t was kiln-dried lumber of various kinds for finishing purposes. State in what condition it arrived in?

A. As I recall this is lumber for the stage and stage fittings. I would not like to be positive about this invoice but my recollection is that a small portion of that lumber was charred by the fire, but just what amount I could not say. Under the circumstances I would not feel inclined to place a loss on that of more than 20 or 25%, according to my recollection.

(Testimony of Harry Gordon.)

Q. I call your attention to exhibit No. 80, which which was for some wire grill work, intended I suppose, to go around the cashier's desk in the office, or something like that.

A. Well, that was worthless when it arrived there.

Q. Those are all of the original exhibits. Now, I call your attention to some new ones. These are some exhibits which you did not have when you were examined before. I call your attention to exhibit No. 82 (showing) and I will ask you to state what condition those goods arrived in?

A. The bookmaking balls were nearly ruined, and my recollection also is that the chuck-a-luck lay out was in such a condition at that time that it was unfit for use. Those items were a total loss.

Q. I call your attention to exhibit No. 83, and I will ask you what condition those goods arrived in, if you remember?

A. Those glass bookmaking layouts were broken —they were worthless.

Q. I call your attention to exhibit No. 84, which is for a roulette wheel.

A. Well, I had supposed that this was included in my testimony in relation to the roulette wheels as I gave it formerly.

Q. No, those were the grote wheels purchased in

(Testimony of Harry Gordon.)

New York, but this was purchased from the Standard Club.

A. Well, its condition, was, as I recall, the same as the other wheels when they arrived there.

Q. I believe you testified before that all the dice were ruined, exhibit No. 85? A. Yes.

Q. I call your attention to exhibit No. 86; what condition did that arrive in?

A. Those trays were in the same condition as the other wooden paraphernalia; the glue was melted; I should consider them worthless as they stood.

Q. Exhibit No. 87 is for a consignment of dice?

A. I have already testified about that.

Q. Exhibit No. 88 is for some trimming shears; what condition were they in?

A. They were in that rusty condition which would make them second-hand stuff; about 40 or 50% damaged from their salable value.

Q. No. 89 is faro cards.

A. I testified about all the cards.

Q. All the cards were ruined? A. Yes, sir.

Q. I call your attention to exhibit No. 90, two card cases, in addition to those mentioned in another exhibit.

A. I do not remember about those card cases.

Q. Exhibit No. 91 is another invoice of dice, and exhibit No. 92 is another invoice of dice; I under-

(Testimony of Harry Gordon.)

stand you to say that they were all ruined—now exhibit 93 appears to be for some dice and roulette layouts and broadcloth and so on?

A. I have already testified as about all that matter —as I recall it.

Q. Exhibit No. 94 is another invoice of dice—exhibit No. 95 is for a crap table, knocked-down—say what condition that arrived in?

A. There was some damage to that crap table; of course being in a knock-down condition it was not as badly damaged as some other gambling paraphernalia. The table, as I recall, had the cover on it, and that was wetted and damaged, and some of the glued parts were damaged, as in other cases. I do not know what would be the fair estimate of that damage, probably 25% as things were up there at that time.

Q. I call your attention to No. 96, which is for—the first six items are for tables, and the balance are for repairs. I will ask you what condition those tables arrived in.

A. As I already stated, the roulette table, in fact all the tables composed of woodwork in which there was any glue, that glue was melted, and all of those joints were loose and the various tables were unfit for use until such time as they could be repaired. I am unable to say what it would cost to repair them. As they stood when they were landed they were abso-

(Testimony of Harry Gordon.)

lutely unfit for use; they might be considered a total loss as they came out of the cargo.

Q. I call your attention to Exhibit No. 97 and exhibit No. 104, which are for the wardrobe. I think you testified about it before, but I do not think you testified about the damage. These bills simply show what you paid for them, bought in New York.

A. I think I testified about those articles, that those were a total loss, that is my recollection.

Q. Exhibit No. 100 is for some billiard cloth; do you remember the condition that arrived in?

A. A portion of that billiard cloth had been wet, and that portion which had been wet was cut off and thrown away, as I now recall, I think that about half of the cloth was ruined. The other portion of the cloth probably could be used, making the damage approximately 50%.

Q. No. 103 is a bill of goods from Baker & Richards; do you remember what condition they arrived in?

A. I think the gypsum was amongst what was classified in the former examination as drugs, and was worthless. The can of enamel and Japan dryer; those were all right, as far as I know, except the loss of the labels.

Q. I call your attention to exhibit No. 105, for some more printed matter:

(Testimony of Harry Gordon.)

A. I intended to include the wine and salary lists in the item of stationery testified about before, as a total loss.

Q. I call your attention to exhibit No. 106, for a couple of stage revolvers, and I will ask you what condition they arrived in.

A. Well, they were rusted the same as the other firearms; they probably sold for 50% of their value.

Q. Here is another invoice from Lowman-Hanford, exhibit No. 108. I do not know what it was for, probably you can tell by reading it.

A. Those envelopes were damaged so that they were worthless.

Q. I call your attention to exhibit No. 109, which was for a lot of door checks.

A. That was printed matter also.

Q. Exhibit No. 110, another consignment of printed blanks. A. Those were also ruined.

Q. I call your attention to exhibit 113, which appears to be for checks; the testimony shows that those were metal bar checks; what condition did those arrive in?

A. Well, I could not say that those had suffered any material damage, in fact I do not recall now ever having examined that package of goods.

Q. Exhibit No. 115; now I am not sure whether

(Testimony of Harry Gordon.)

you testified before as to the Cosmic Pompey Red, and two Colt's revolvers and two Marlin rifles?

A. I testified as to those.

Q. Exhibit No. 116 is for another bill of finishing lumber; what condition that arrive in?

A. As far as my recollection serves me the finishing lumber was all together; that is to say, when it was placed in the wareroom of the Standard Theater Company for examination it was all piled up together, and what I had to say with reference to the finishing lumber before referred to applies to this.

Q. Here are a number of little bills, embraced in exhibit No. 117; the total about ninety cents; what condition were those in?

A. The items in this invoice are all hardware and were in the same condition as the other hardware about which I have testified.

Q. Exhibit No. 118: I call your attention to that, with the exception of the first item which appears to be for wharfage, and the rest some other goods which was a part of this cargo. I will ask you what condition they arrived in.

A. That portion of the invoice which comprises the hardware was the same as the other hardware heretofore testified about. The stamping ink, as I recall it, had leaked out. The nickel plated oil can

(Testimony of Harry Gordon.)

was, as I recall now, in fair condition and probably that suffered but little damage.

Q. I call your attention to exhibit No. 119 which contains, among other items, chamois skins and chamois skin sacks and drilling and lead and carpet-sweeper; what condition did that arrive in?

A. The carpet-sweeper was unfit for use. I do not remember about the chamois skin articles.

Q. No. 121 is for a combination stove; I will ask you if you remember what condition that arrived in.

A. That was in about the same condition as the other stoves, rusted; in a condition to be called second-hand.

Q. Exhibit No. 122 is for a lot more of dice.

A. Those are included in my former testimony.

Q. And Exhibit No. 123?

A. Those were also included in my other testimony.

Q. Exhibit No. 125?

A. Another bill from Baker & Richards company. Those articles in cans, of course, so far as I know, were in good condition, except the loss of the labels from the cans. Those articles which were packed in paper were practically worthless, the paper having been wetted.

Q. Exhibit No. 126, which contains, among other things, forty bladders, six dozen silkoline Granville

(Testimony of Harry Gordon.)

masks, Japanese parasols and screens and lanterns, one large American flag, one hundred yards of red, white and blue bunting and flagging, one woven life net; four turn buckle posts for the same. I will ask you whether you remember what condition they arrived in?

A. I do not remember the condition of the bladders; the silkoline masks had been wetted and were in practically the same condition as the other wardrobes were, worthless; the parasols were ruined; the Chinese screens and lanterns were worthless. I do not recall examining the flag; the bunting was ruined by reason of the moisture. I am unable to estimate the damage on the life net. I do not know about the turn buckles or posts.

Cross-examination.

Q. (Mr. POWELL.) Referring to these doors, Mr. Gordon, which you have testified about having been damaged about 40%; do you know where those doors were stored in the cargo?

A. I have no knowledge of the stowing of the cargo.

Q. How badly were the crates charred; did it indicate that they were on fire?

A. They indicated, those which were charred, that they had been, of course, near the fire enough to

(Testimony of Harry Gordon.)

be blackened and discolored. I recall one or two of the crates that had burned through and the corner of the doors were burned.

Q. What was the trouble with the sandpaper; you say that was worthless?

A. Well, it had been moist, and that ended its use.

Q. You have testified that the glue was worthless; was it melted?

A. My recollection is that it had melted from the effects of heat of some sort.

Q. And the oilcloth, what was its condition?

A. That showed the effects of heat on the finished surface.

Q. Those cotton blankets and this oilcloth, were they all in one bundle or package, do you remember?

A. I think not, I am not sure; I think they were in separate bundles; I think the oilcloth was wrapped as it is usually, and the blankets were tied in another bundle.

Q. What was finally done with the kitchen outfit and utensils?

A. I cannot answer that question; at the time I left the employ of the company they still had a mess there and some of the articles were in use, but what proportion of them I do not know because I was not a member of the mess.

(Testimony of Harry Gordon.)

Q. All of the gambling paraphernalia, including the roulette wheels, chuck-a-luck tubs and layout and so forth, and all that paraphernalia is put together largely with glue, is it not, the roulette wheels and so on?

A. So far as my observation goes they are.

Q. What was the condition of the roulette or roulette tables and chuck-a-luck tables, this fine work?

A. They were simply in a condition that they could not be used at all; they were in a wrecked condition by reason of the loosening of the joints.

Q. That is, they had come to pieces?

A. Yes.

Q. That coming to pieces was occasioned by the melting of the glue or other substance that had been used to hold the parts together?

A. I took that to be the trouble.

Q. Now, this sewer pipe which you speak of was damaged by being broken?

A. Yes, that of course—

Q. Can you tell from the appearance of it whether it had been broken by rough handling or something of that kind, or whether it had been broken by the action of the heat?

A. The only way to determine that would be by the appearance of the broken pieces.

(Testimony of Harry Gordon.)

Q. That is what I want to get at.

A. While I may not be able to describe it to your satisfaction, but the appearance to me was not of a break of an ordinary fresh piece of sewer pipe, but there seemed to be a sort of crystallization of the pipe, and it seemed to be in a rotten condition, some of it, and I drew the inference for myself that those pieces of pipe had been very near intense heat and that the effect of that had been possibly followed by water being flooded on it suddenly, and causing the crystallization and the cracking.

Q. Now, those cigars which you speak of being damaged 50%; what was their condition; that is, in what did the damage consist, as it appeared to you when you examined it?

A. My recollection as to the cigars was that the two large boxes had been damaged by moisture on one side. They were quite large crates, and there appeared to be on the other side a damage from heat.

Q. They were all crated up in boxes—did the boxes show indications of having come in contact with the fire in any degree?

A. My recollection is that one of the large crates or boxes showed some scorching on one side; I think it did.

Q. Do you remember about those fifty barrels?

A. I remember very distinctly about those.

(Testimony of Harry Gordon.)

Q. What condition were those barrels in?

A. The condition of the barrels was simply this, that at the bung holes the outside surface of the barrels showed a leak, some of them, while we were handling them, showed the liquor exuding from the bung holes. Occasionally there would seem to be a barrel that semed to be lighter than the other barrels.

Q. Now, did those barrels show any indication of having been close to intense heat—close to the fire?

A. I do not recall now that any of the barrels showed charring; I cannot say that they did; I could not say positively, although I helped to lift every barrel of the cargo; I do not recall a barrel.

Q. Now, the tools which you spoke of being rusted, on Exhibit No. 70, what was finally done with those tools?

A. I cannot remember, I cannot say.

Q. Those poker chips that were broken; do you remember what they were made of?

A. My recollection is that they were those celluloid chips, and they were in very bad shape.

Q. Now, that glass bookmaking layout; what did the appearance of that layout indicate as the cause of its damage?

A. I do not know, Mr. Powell, that I would be able to state definitely.

Q. What was its appearance?

(Testimony of Harry Gordon.)

A. It was simply broken; the glass was all broken; it was in bad condition when it came on shore; I could not undertake to say precisely what caused that breakage on the ship; I have no means of knowing.

Q. Those trimming shears which you speak of, those were for trimming cards.

A. The sale value of those was reduced.

Q. Could they be used for the purpose for which they were designed?

A. Yes, they could be used; do not understand that they were not in condition that they could not be used, but they were rusted and they were second-hand, as they stood there.

(Testimony of witness closed.)

Seattle, April 28, 1905.

Continuation of proceedings pursuant to agreement.

Present: Mr. BRINKER, for the Libelant.
Mr. POWELL and Mr. GRIGGS, for the Claimant.

Mr. MALLOY, recalled on behalf of the libelant, testified as follows:

Q. (Mr. BRINKER.) Mr. Malloy, here is a bill for forty-five barrels of whisky, of W. A. Lacy, amounting to $3,602.65, made out to L'Abbe and Mal-

(Testimony of W. A. Malloy.)

loy. I will ask you about that, where it came from and what it is.

A. That was purchased from the Standard Theater Company.

Q. Was that part of the cargo of the "Santa Ana" on the voyage May 26th, 1900?

A. Yes, sir.

Q. Now, what damage, if any, did the whisky in that 45 barrels suffer by the fire, or effort to put out the fire of June 2d, on board that ship?

A. It was short, the same as the rest of them; damaged about thirty per cent. It seemed as though the whisky came outside of the bung hole and ran down on each side of the barrel.

Q. Now, here is a freight bill, with a statement attached to it, apparently from the traffic manager of the Northern Pacific Railroad, for 91 barrels of whisky. I will ask you how much of that, if any, was for freight upon whisky of the Standard Theater Company?

A. There was sixty-five barrels—forty-five and twenty—that came in that car for the Standard Theater Company; the other came for Gottstein and some of the other liquor houses. Sixty-five, that was for the Standard Theater Company.

Q. Was there 65 barrels of this 91 barrels, be-

(Testimony of W. A. Malloy.)

longing to the Standard Theater Company, and did they pay the freight upon that quantity?

A. Yes, sir.

Q. Is this statement from the traffic manager of the K. B. & W. Co.—I don't know what that is, some railroad company, with the amount paid on the shipment to the Standard Theater Company?

A. Two hundred and sixty-one dollars and twenty-five cents; that is about correct.

Mr. BRINKER.—Mr. Powell, I will offer this freight bill and this statement attached to it from the traffic manager of some railroad company, and this invoice for 45 barrels of W. A. Lacy, sour mash whisky, as a part of Exhibit 53.

(Paper marked Exhibit No. 53, filed and returned herewith.)

Cross-examination.

Q. (Mr. POWELL.) Do you know where, in the hold, Mr. Malloy, the whisky was stowed?

A. It was in the bottom of the vessel.

Q. With the rest of the barrel goods?

A. Yes, sir.

Q. Now, this whisky represented by this invoice introduced in evidence, was barrel goods?

A. Yes, sir.

Q. Do you remember to whom you sold any of that whisky?

(Testimony of W. A. Malloy.)

A. Sold it to different parties in Nome.

Q. What did you sell it for, what price?

A. Sold as low as $35 per barrel.

Q. Sold as low as thirty-five dollars per barrel?

A. Yes, some of it; yes, some for forty dollars; some fifty dollars and some sixty dollars. Different prices.

Q. Whatever you could get for it?

A. Yes.

Q. To whom did you sell any of it at $35 per barrel?

A. Well, different parties there. I do not suppose that they are in business now. Anybody that wanted to buy it—peddled it out.

Q. In what way was the whisky injured?

A. Well, it seemed to be; I don't know whether it had—it didn't seem to have the right taste; it seemed to be a kind of peculiar taste to it; lots of complaints about it afterwards from the parties who bought it.

Q. Did you measure up each barrel to see how much was taken out of it?

A. Well, no. I went according to the gauger's list. After the whisky was sold to these parties, they said the barrels were seven to ten gallons short

Q. Well, of these barrel goods, they were perfectly stowed in the hold of the vessel; all the barrels were in the bottom of the vessel?

(Testimony of W. A. Malloy.)

A. Yes, stowed in the bottom of the vessel.

Q. You sold according to the gauger's list?

A. Yes, sir.

(Testimony of witness closed.)

Mr. BRINKER.—I desire to have made a part of the record "The York-Antwerp Rules of 1890," the rules that have been referred to in the record.

Mr. POWELL.—We have no objection.

The following is a copy of said rules:

"THE YORK-ANTWERP RULES OF 1890.

Rule I.—Jettison of deck cargo.

No jettison of deck cargo shall be made good as general average.

Every structure not built in with the frame of the vessel shall be considered to be a part of the deck of the vessel.

Rule II.—Damage by jettison and sacrifice for the common safety.

Damage done to a ship and cargo, or either of them, by or in consequence of a sacrifice made for the common safety, and by water which goes down a ship's hatches opened or other opening made for the purpose of making a jettison for the common safety, shall be made good as general average.

Rule III.—Extinguishing fire on shipboard.

(Testimony of W. A. Malloy.)

Damage done to a ship and cargo, or either of them, by water otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be made good as general average; except that no compensation shall be made for damage to such portions of the ship and bulk cargo, or to such separate packages of cargo, as have been on fire.

Rule IV.—Cutting away wreck.

Loss or damage caused by cutting away the wreck or remains of spars, or of other things which have previously been carried away by sea-peril, shall not be made good as general average.

Rule V.—Voluntary stranding.

When a ship is intentionally run on shore, and the circumstances are such that if that course were not adopted she would inevitably sink, or drive on shore or on rocks, no loss or damage caused to the ship, cargo and freight, or any of them by such intentional running on shore shall be made good as general average. But in all other cases where a ship is intentionally run on shore for the common safety, the consequent loss or damage shall be allowed as general average.

Rule VI.—Carrying press of sail—Damage to or loss of sails.

(Testimony of W. A. Malloy.)

Damage to or loss of sails and spars, or either of them, caused by forcing a ship off the ground or by driving her higher up the ground, for the common safety, shall be made good as general average; but where a ship is afloat, no loss or damage caused to the ship, cargo and freight, or any of them by carrying a press of sail, shall be made good as general average.

Rule VII.—Damage to engines in refloating a ship.

Damage caused to machinery and boilers of a ship, which is ashore and in a position of peril, in endeavoring to refloat, shall be allowed in general average, when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage.

Rule VIII.—Expenses lightening a ship when ashore, and consequent damage.

When a ship is ashore and, in order to float her, cargo, bunker coals, and ship's stores, or any of them are discharged, the extra cost of lightening, lighter hire, and reshipping (if incurred), and the loss or damage sustained thereby, shall be admitted as general average.

Rule IX.—Cargo, ship's materials, and stores burnt for fuel.

Cargo, ship's materials, and stores, or any of them, necessarily burnt for fuel for the common safety at a time of peril, shall be admitted as general aver-

(Testimony of W. A. Malloy.)

age, when and only when an ample supply of fuel had been provided; but the estimated quantity of coals that would have been consumed, calculated at the price current at the ship's last port of departure at the date of her leaving, shall be charged to the shipowner and credited to the general average.

Rule X.—Expenses at port of refuge, etc.

(a) When a ship shall have entered a port or place of refuge, or shall have returned to her port or place of loading, in consequence of accident, sacrifice, or other extraordinary circumstances, which render that necessary for the common safety, the expenses of entering such port or place shall be admitted as general average; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place, consequent upon such entry or return, shall likewise be admitted as general average.

(b) The cost of discharging cargo from a ship, whether at a port or place of loading, call, or refuge, shall be admitted as general average, when the discharge was necessary for the common safety or to enable damage to the ship, caused by sacrifice or accident during the voyage, to be repaired, if the repairs were necessary for the safe prosecution of the voyage.

(Testimony of W. A. Malloy.)

(c) Whenever the cost of discharging cargo from a ship is admissible as general average, the cost of reloading and storing such cargo on board the said ship, together with all storing charges on such cargo, shall likewise be so admitted. But when the ship is condemned or does not proceed on her original voyage, no storage expenses incurred after the date of the ship's condemnation or of the abandonment of the voyage shall be admitted a general average.

(d) If a ship under average be in a port or place at which it is practicable to repair her, so as to enable her to carry on the whole cargo, and if, in order to save expenses, either she is towed thence to some other port or place of repair or to her destination, or the cargo or a portion of it is transshipped by another ship, or otherwise forwarded, then the extra cost of such towage, transshipment and forwarding, or any of them (up to the amount of the extra expense saved) shall be payable by the several parties to the adventure in proportion to the extraordinary expense saved.

Rule XI.—Wages and maintenance of crew in port of refuge, etc.

When a ship shall have entered or been detained in any port or place under the circumstances, or for the purpose of the repairs mentioned in Rule X, the wages payable to the Master, Officers and Crew,

(Testimony of W. A. Malloy.)

together with the cost of maintenance of the same, during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed on her voyage, shall be admitted as general average. But when the ship is condemned or does not proceed on her original voyage, the wages and maintenance of the Master, Officers and Crew, incurred after the date of the ship's condemnation or of the abandonment of the voyage, shall not be admitted as general average.

Rule XII.—Damage to cargo in discharging, etc.

Damage done to or loss of cargo necessarily caused in the act of discharging, storing, reloading, and stowing, shall be made good as general average, when and only when the cost of those measures respectively is admitted as general average.

Rule XIII.—Deductions from cost of repairs.

In adjusting claims for general average, repairs to be allowed in general average shall be subject to the following deductions in respect of "new for old," viz:

Up to 1 Year Old.

(A.)

All repairs to be allowed in full, except painting or coating of bottom, from which one third is to be deducted.

(Testimony of W. A. Malloy.)

Between 1 and 3 Years.

(B.)

One-third to be deducted off repairs to and renewal of woodwork of hull, masts and spars, furniture, upholstery, crockery, metal and glassware, also sails, rigging, ropes, sheets, and hawsers (other than wire and chain), awnings, covers, and painting.

One-sixth to be deducted off wire rigging, wire ropes and wire hawsers, chain cables and chains, donkey-engines, steam winches and connections, steam cranes and connections; other repairs in full.

Between 3 and 6 Years.

(C.)

Deductions as above under clause B, except that one-sixth be deducted off ironwork of masts and spars, and machinery (inclusive of boilers and their mountings).

Between 6 and 10 Years.

(D.)

Deductions as above under clause C, except that one-third be deducted off ironwork of masts and spars, repairs to and renewal of all machinery (inclusive of boilers and their mountings), and all hawsers, ropes, sheets, and rigging.

Between 10 and 15 Years.

(E.)

One-third to be deducted off all repairs and renewals, except ironwork of hull and cementing and

(Testimony of W. A. Malloy.)

chain cables, from which one-sixth to be deducted. Anchors to be allowed in full.

Over 15 Years.

(F.)

One-third to be deducted off all repairs and renewals. Anchors to be allowed in full. One-sixth to be deducted off chain cables.

Generally.

(G.)

The deductions (except as to provisions and stores, machinery and boilers) to be regulated by the age of the ship, and not the age of the particular part of her to which they apply. No painting bottom to be allowed if the bottom has not been painted within six months previous to the date of accident. No deduction to be made in respect of old material which is repaired without being replaced by new, and provisions and stores which have not been in use.

In the case of wooden or composite ships:

When a ship is under one year old from date of original register, at the time of accident, no deduction new for old shall be made.

After that period a deduction of one-third shall be made, with the following exceptions:

Anchors shall be allowed in full. Chain cables shall be subject to a deduction of one-sixth only.

(Testimony of W. A. Malloy.)

No deduction shall be made in respect of provisions and stores which had not been in use.

Metal sheathing shall be dealt with, by allowing in full the cost of a weight equal to the gross weight of metal sheathing stripped off, minus the proceeds of the old metal. Nails, felt, and labor metaling are subject to a deduction of one-third.

In the case of ships generally:

In the case of all ships, the expense of straightening bent iron work, including labor of taking out and replacing it shall be allowed in full.

Graving dock dues, including expenses of removals, cratages, use for shears, stages, and graving dock materials, shall be allowed in full.

Rule XIV.—Temporary repairs.

No deductions "new for old" shall be made from the cost of temporary repairs of damages allowable as general average.

Rule XV.—Loss of freight.

Loss of freight arising from damage to or loss of cargo shall be made good as general average either when caused by a general average act or when the damage to or loss of cargo is so made good.

Rule XVI.—Amount to be made good for cargo lost or damaged by sacrifice.

The amount to be made good as general average for damage or loss of goods scarificed shall be the

(Testimony of W. A. Malloy.)

loss which the owner of the goods has sustained thereby, based on the market values at the date of the arrival of the vessel or at the termination of the adventure.

Rule XVII.—Contributory values.

The contribution to a general average shall be made upon the actual values of the property at the termination of the adventure, to which shall be added the amount made good as general average for property sacrificed; deduction being made from the shipowner's freight and passage money at risk, of such port charges and crew's wages as would not have been incurred had the ship and cargo been totally lost at the date of the general average act or sacrifice, and have not been allowed as general average; deduction being also made from the value of the property of all charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average.

Passengers' luggage and personal effects not shipped under bill of lading, shall not contribute to general average.

Rule XVIII.—Adjustment.

Except as provided in the foregoing rules, the adjustment shall be drawn up in accordance with the law and practice that would have governed the adjustment had the contract of affreightment not con-

(Testimony of W. A. Malloy.)

tained a clause to pay general average according to these rules.

Mr. GRIGGS.—The claimant moves the Court for an order dismissing the libel herein and for judgment in favor of the claimant for costs, for the following reasons: First, the libelant has failed to make out a case for contribution in general average against the respondent. Second, that there is not sufficient evidence before the Court to enable the Court to determine what sum, if any, libelant is entitled to on account of the matters and things set forth in its amended libel. And that the evidence introduced by libelant is insufficient to justify an award and decree in favor of the libelant for any sum whatsoever. Third: That by the terms of the contract of affreightment under which libelant's goods were received and carried upon the "Santa Ana," any adjustment in general average was to be made and arrived at by and under and in accordance with the York Award Rules. The libelant has failed to introduce in any sense evidence to enable the Court to make an award and adjustment according to said rules, or at all. Now, we wish to state, also, in proceeding with claimant's testimony, we do it with an express reservation of our rights under this motion, and all

(Testimony of William D. Wood.)

objections that we have made, and without waiving any of it.

CLAIMANT'S TESTIMONY.

WILLIAM D. WOOD, a witness called on behalf of the claimant, being duly sworn, testified as follows:

Q. (Mr. POWELL.) Judge Wood, you were on the "Santa Ana" on her voyage in May, 1900, from Seattle to Nome, were you not?

A. I was on board of her at Dutch Harbor, but I did not go up on her. I saw her when she was loaded, and I was at Nome when she arrived.

Q. Who had the vessel in charter?

A. The Seattle and Yukon Transportation Company.

Q. What connection did you have with that Company?

A. I was President of that company, and active manager of its business in the north.

Q. Now, what vessel did you take from Seattle to Dutch Harbor? A. The "San Blas."

Q. And at Dutch Harbor, you took passage on the "Santa Ana" from there to Nome?

A. No. We were in port together at Dutch Harbor, and I was on board there, but I went to Nome on the "San Blas."

(Testimony of William D. Wood.)

Q. The "Santa Ana" was being, at that time, operated by the Seattle and Yukon Transportation Company? A. Yes.

Q. Did you arrive at Nome ahead of the "Santa Ana"? A. Yes, some days.

Q. You recollect about what time the "Santa Ana" arrived at Nome?

A. I think, from memory, about June 12th, but that is a good while ago.

Q. Just an estimate. And she went in quarantine for a few days?

A. She had been in quarantine about ten days. I might be a week astray on the date of her arrival.

Q. It was the latter part of June, anyway?

A. Yes, it was about that time.

Q. And you were in Nome at the time?

A. Yes, I arrived in Nome June 12th.

Q. Did you board the "Santa Ana"?

A. I did.

Q. Who was captain of the vessel at the time?

A. Capt. C. F. Strand.

Q. Were you on the vessel and superintending the unloading of the cargo while she was unloading at Nome, or who superintended that, if you did not?

A. Well, I had charge of the discharging of the cargo on shore.

Q. From the lighter?

(Testimony of William D. Wood.)

A. From the lighters, and together with the assistance that we had there; we had a local agent and a number of men employed in our office force there.

Q. And you had general supeintendency of it?

A. Yes.

Q. There are no wharves at Nome? A. No.

Q. All goods had to be taken from the vessel by lighter? A. That is right.

Q. And a portion of that cargo belonged to the Standard Theater Company? A. Yes.

Q. That was shipped here at Seattle to Nome?

A. Yes, sir.

Q. Who represented the Standard Theater Company at that time at Nome, while you were there?

A. Mr. Malloy was the man that we had practically, all in fact, so far as I remember, all our dealings with.

Q. The cargo had been damaged some when it arrived? A. It had.

Q. There had been a fire on board the vessel?

A. Yes, sir.

Q. Where was the barrel of goods stowed, what part of the hold?

A. It is my impression they were stowed in the bottom of the hold along with other heavy goods. I was here when the "Santa Ana" was loaded, and saw the cargo going in; I did not have personal charge

(Testimony of William D. Wood.)

of it, but my general impression is that all heavy items like machinery, barrel goods and things of that sort, went in the bottom of the hold.

Q. Now where were the lighter portions of the cargo of the Standard Theater Company stowed, the scenery, etc.?

A. Well, they were stowed all together in the upper portion of the hold; although my knowledge of the exact location of the cargo on board is limited. I did not have charge either of the placing or stowing or taking it out.

Q. Now, where were the goods of the Standard Theater Company placed when they were landed at Nome and taken off the lighters on the beach?

A. Well, they were first landed from the lighters on the beach and then a portion of them, some of the heavier items, were placed in my warehouse at Nome temporarily, or left on the beach and distributed from that point; I think some of the barrel goods were taken in wagons to persons who bought them, immediately from the beach. The principal portion of the cargo was taken under an arrangement between Mr. Gollin, the adjuster and Mr. Malloy and myself, to the warehouse of the Standard Theater Company at some point in Nome.

Q. Well, what was that arrangement betwen you

(Testimony of William D. Wood.)

and Mr. Malloy and Mr. Gollin, as near as you can give it?

A. Well, when the vessel arrived and the passengers came ashore I met Mr. Malloy. Previous to that time I had arranged with Mr. Gollin, who was, as I understood, an insurance adjuster, to adjust or estimate the losses to the goods and the damage to the goods, resulting from the fire on board.

Q. Did Captain Strand have anything to do with that?

A. Captain Strand had notified me in Dutch Harbor of the fire and he also came ashore when he landed at Nome, and he notified me that it would be necessary to have a survey of the goods on account of the losses for the purposes of general average, and I stated to him what preliminary arrangemnts I had made for having a survey of the goods by Mr. Gollin, and that was satisfactory to him, and what we did was with the Captain's knowledge, and in pursuance of the understanding, which was in part with him. Mr. Gollin, Mr. Malloy and myself discussed the matter, both as to the question of the deposit to cover any general average award that might be made against the cargo, and also as to the ascertaining of the damage; and I told Malloy that I had employed and arranged with Mr. Gollin to make the survey, and that it would be necessary for

(Testimony of William D. Wood.)

them to go over the goods as they landed in order to ascertain what the damage was. And Mr. Malloy assented to that proposition. And I left the matter to be worked out under that arrangement by Mr. Gollin as the representative of ourselves and the ship, and in fact of all interests that might appear. And they went at it and the goods were then delivered to them as they came from the beach off from the lighters. On the question of a deposit to cover the general average, we took this position, that the Standard Theater Company and all the shippers, at first, that a ten per cent deposit should be required right through the cargo, but in cases where there was marine insurance on the goods, we would not required any such deposit because teh insurance company would answer for that deposit, as we understood it there. And so the deposit question was never urged as against the Standard Theater Company, because they had some marine insurance on the goods.

Q. Did you see the barrel goods as they were being unloaded?

A. Yes, I was about there during the time that this cargo was coming off the ship, and I think I saw the larger portion of them. There might have been some loads that came off when I was not here, but I saw a large number of barrels.

(Testimony of William D. Wood.)

Q. Did you make any examination of them yourself to see whether they were damaged or not?

A. No close examination. I was around them as they were handled, but I did not make or did not attempt to make an examination of the barrels closely. I saw very clearly the general appearance of them.

Q. Well, what was it, did they appear to have been damaged, the barrel goods, or not?

A. To my eye, so far as the exterior of the barrels was concerned, they seemed to be unharmed.

Q. None of them broken open or anything of that kind?

A. No, I did not see any of them at all broken. I do not think that they were any to speak of, if any, that were discolored or gave evidence of having been supjected to any particuar heat, as may other items in the charge did show.

Q. I suppose some of the cargo gave evidence of having been in contact with the fire?

A. Oh, yes, some of the packages were very much discolored, and of course a few were actually burned by the fire, but not many.

Q. How long did you stay in Nome, Mr. Wood?

A. Well, I was in Nome for three months or three months and a half, after that time, until the

(Testimony of William D. Wood.)

close of navigation, except for short visits to St. Michael, where we also had business.

Q. What business were you engaged in at that time?

A. Superintending the business of the Seattle and Yukon Transportation Company.

Q. Were you advised by Mr. Malloy, or any one connected with the Standard Theater Company, that they had arrived at any adjustment of the losses, with Mr. Gollin?

Mr. BRINKER.—I object to that as irrelevant and immaterial, and as tending to elicit hearsay evidence.

A. No, I do not remember that they ever expressly stated to me that they had arrived at the loss, but they had been during all that time at work upon the matter. I saw them together inspecting the goods and they were working under the arrangement that we had first made, and I was aware from my personal observations there and contact with them almost constantly, that the work of inspection had been completed, and the goods taken away by them under that arrangement.

Q. Was any complaint ever made to you while you were there, that the adjustment of the losses had been faulty or defective in any way?

(Testimony of William D. Wood.)

Mr. BRINKER.—I object as irrelevant and immaterial.

A. No, no such complaint or statement was ever made to me or to any representative of our company that I know of.

Q. Did the Seattle and Yukon Transportation Company have a warehouse at Nome at that time?

A. They did, a canvas warehouse, covered with sheet iron principally and timber frame; similar to the warehouses in use generally at that time.

Q. How many, one or two?

A. Well, we had two on the beach, where this was being discharged, and a second one may have been in process of construction when these goods were coming off; I am not sure as to that, but there was one complete and that was used for the handling of that cargo.

Q. Judge Wood, the arrangement that you speak of as having been made with the Standard Theater Company for the delivery of their goods, and an adjustment of the losses, was that peculiar to the Standard Theater Company, or was similar arrangements made with all the shippers?

A. Similar arrangements were made with all the shippers on the ship.

Q. Did any of them make a deposit?

A. They were all notified that they could not

(Testimony of William D. Wood.)

have their goods until they made a deposit to cover general average that Mr. Gollin had specified, equal to ten per cent of the value of the goods, until the damage to their goods had been determined. As to the deposit: Before we had gone very far into an inspection of the cargo, we concluded that it would be fair to allow in every case a minimum damage of ten per cent, which would be sufficient to offset the deposit which we at first concluded to ask or require. From that time the deposit matter was waived, and a few deposits that had been made were returned to the consignees; and from that time forward Mr. Gollin started out with the minimum allowance of ten per cent to every shipper. And then he took the matter up with the consignees in person, in each case, and determined upon a damage allowance and issued a certificate to them and to ourselves, in duplicate. There was one case in which the consignees declined to receive their goods; the goods were insured and they abandoned them. That was a consignment of eight or ten tons of groceries. These goods were sold at auction in our warehouse and returned the proceeds with the adjustment down here. I should probably add that no goods were delivered from the ship without such an adjustment of damage. There were cases where there was a controversy between the consignee and Mr. Gollin,

(Testimony of William D. Wood.)

and where I was called in in the matter. In these cases I told them that unless they agreed upon the amount, that each party would have to proceed and preserve his own evidence of the damage which he believed to exist, for settlement down here.

Cross-examination.

Q. (Mr. BRINKER.) Judge, what was the arrangement that you made with Mr. Malloy, in the presence of Mr. Gollin, with reference to the cargo of the "Santa Ana"? State it fully and explicitly.

A. That is a long while ago, but I will do my best. My memory seems pretty clear to me on the subject. The Captain had notified me that it would be necessary to have an adjustment or appraisement of the loss for general average purposes; and several days before the captain came ashore, and before the vessel had arrived, I had gone to see Mr. Gollin, because I knew that there were insured goods on the ship, and because I wanted to have some representative of the insurance companies to make an inspection of the goods, and be represented in the matter. Therefore, when the ship arrived and Mr. Malloy came ashore, I brought Mr. Malloy and Mr. Gollin together. Their shipment was a large one in the cargo, and I knew from my knowledge of the shipment here that it was insured. And I stated to

(Testimony of William D. Wood.)

Mr. Malloy that it would be necessary, before the goods could be delivered, before we had any right to deliver the goods; that the amount of loss should be ascertained and that I had employed Mr. Gollin, who was an insurance adjuster, to go over the goods as they came ashore, and that he would be the representative of the ship and of our company as the charterers and of the insurance companies in that investigation. And that I desired them to take the mater up together and go over the goods as they came ashore and find what the loss was, and that if they agreed on the loss, or as they agreed on the damage, why the goods could be deilvered. That as to the deposit that would not be necessary in their case, because their goods were insured and we were willing to look to the insurance company for any general average award that might be made against the cargo. Mr. Malloy assented to the suggestion of going over the goods with Mr. Gollin.

Q. What did he say?

A. He said "Very well." I cannot remember his words. The substance of the arrangement that is in my mind; but he assented to the arrangement and assented and agreed to go over the goods with Mr. Gollin for the purpose of finding out what the loss was; and from that time on I left the matter in their hands.

(Testimony of William D. Wood.)

Q. That is the only talk, then, that you had with Malloy with reference to an examination of the goods, is it?

A. I think that is the only conversation of any consequence. I was seeing Mr. Malloy every day.

Q. Do you remember any other conversation that you had with him with reference to the adjustment of the damages upon the property?

A. No, I do not; I do not remember any conversation except the first one that related specifically to them.

Q. At whose suggestion were those goods removed from that warehouse, if they were removed, to the warehouse of the Standard Theater Company?

A. I think, as a matter of fact that was arranged between Mr. Gollin and Mr. Malloy.

Q. Did you bring Gollin and Malloy together, did you introduce them? A. Yes, sir.

Q. That is the first that they had seen of each other? A. So far as I know.

Q. Now, how did the goods happen to be taken from the S. Y. T. Co's. warehouse, that place on the beach, up to the Standard Theater's warehouse?

A. Well, the information that I had upon that point was—

Q. If you know from your own knowledge?

(Testimony of William D. Wood.)

A. Well, that is a point that I insisted on knowing about, because I did not want—it had been arranged, that these goods should not go until inspected, and I inquired why these goods were being taken away.

Q. Who did you inquire of?

A. Mr. Gollin and my own employees there.

Q. Now, is not this the fact, that these goods after they had come ashore from the vessel, that you had no place to keep them properly, and that at your request and upon your suggestion they were removed up to the Standard Theater Company's warehouse; and did not you at that time say that if they removed their goods up there that nobody would waive anything by moving them up there, you or the Standard Theater Company?

A. That statement is correct, in part. I will state my impression of it. The suggestion for the removal of the goods, so far as I know, came from the Standard Theater Company; it did not come from me. We had a warehouse there 30x150 feet, with ten-foot walls, that we were using. The warehouse was pretty well occupied. We could have handled these goods there, but it was much more convenient to handle them in the warehouse of the Standard Theater Company, that they had prepared to receive the goods; and when the matter was suggested to me, I assented

(Testimony of William D. Wood.)

to the proposition of removing the goods to their warehouse as a matter of convenience.

Q. Do you remember who made that suggestion to you?

A. No, I cannot tell now whether Malloy—that conversation was with Malloy or Gollin, but I remember that the matter was suggested to me, or I inquired about it, and I received that information that as a matter of convenience they be taken up there, and it is entirely likely that I stated that that arrangement should be without prejudice to the rights of either party, because that was the understanding I had of it.

Q. Your understanding was that the removal of the goods would not be deemed a waiver upon the part of the Standard Theater Company of any rights they had in the matter?

A. No, for this reason, it was a part of my duty as a shipper—as a common carrier, to see that these goods were not delivered until the loss was ascertained. And the pertinent feature of that understanding, so far as we were concerned, would be that even if these goods were taken to the Standard Theater Company's warehouse, they were still in our custody as common carriers until the loss was ascertained. That was what I understood by that proposition.

(Testimony of William D. Wood.)

Q. You understood then that you had a right to retain actual manual custody of the goods until the loss was ascertained?

A. Until the loss was ascertained, or until evidence of the loss had been preserved for any parties who might be interested in the adjustment of the question there in general average, or in the courts.

Q. Now, in connection with that, I will ask you if you took any general average bonds?

A. No, for the reason I have stated. It would have been impossible to take bonds at Nome. Instead of that we were interested in taking deposits.

Q. But afterwards you waived that?

A. Yes, sir.

Q. Now, were you not mistaken as to what your rights were in the premises? Did you have a right to retain that cargo until the damage was ascertained? Were not your rights simply to retain the cargo until a general average bond was given?

A. Well, I might have been mistaken as to what our exact right was.

Q. But that is what you endeavored to do?

A. But I understood and still believe that it was our duty as common carriers to not only take security to meet the general average claim against the goods, but to preserve evidence of the conditions.

(Testimony of William D. Wood.)

Q. Well, you in fact took no general average bonds?

A. No, for the reason that we had concluded to allow a minimum of ten per cent upon all shipments, and that amount we deemed to be sufficient to meet the general average liability to the cargo.

Q. You then admitted, did you at the time, or intended to admit, that the vessel was liable for the minimum of ten per cent of the value of the cargo?

A. That the cargo was damaged throughout to the extent of ten per cent without reference to who might be liable for it.

Q. Now, I will call your attention to a conversation, and see if you remember it. Do you know A. G. Lane?

A. Yes, I do. He used to be a police officer here in the city.

Q. Yes, sir. And was there in charge of the building operations of the Standard Theater Company? A. I know him.

Q. Do you know P. J. Considine?

A. Yes, sir.

Q. Do you know George A. L'Abbe?

A. Yes, sir.

Q. Now, do you remember a conversation between yourself and Considine and Lane, with reference to the removal of the goods from the warehouse

(Testimony of William D. Wood.)

of the Seattle-Yukon Transportation Company to the Standard Theater Company, after the goods had been landed on the beach?

A. I do not remember any conversation with them, but it is very likely that at the time when we had the conversation I have testified to, or made the agreement I testified to, that others were present, and I would not be at all surprised.

Q. This conversation I have reference to now, Malloy was not present. The conversation I ask you about was between yourself, Lane, Consadine and L'Abbe, at the warehouse or on the beach near the warehouse of the S. Y. T. Co., at Nome, after the goods had been landed, or while in process of being landed.

A. I remember that all these men were about there at the time and I was in the habit of speaking with them, but I do not remember now any specific conversation with them in relation to this matter.

Q. I will ask you if you did not have this conversation, and if this was not the only conversation you had with anybody interested in the Standard Theater Company, with refernce to the removal of the goods from the S. Y. T. Co.'s warehouse or custody up to the warehouse of the Standard Theater Company. Tom Consadine, L'Abbe and Lane met you at the place where you landed this cargo, I think in the pres-

(Testimony of William D. Wood.)

ence of the men or man who was checking up cargo for your company—do you remember his name—a tall man?

A We had several helping us whose names I do not recollect. We had three men at least, aside from Mr. Norris, who was our local agent there, but at this time I do not remember this man's name that you describe to me as a tall man.

Q. I will ask you whether Consadine did not say "Now, if there is any of this cargo that is worth anything that we can do anything with, let us get it out and take care of it" or words to that effect, and did not you in that connection say "Yes, I want you to take your goods and take them away from here, because we have not room for them," or words to that effect? And did not you also say in the same conversation that I speak of, to Lane and Consadine and L'Abbe, that "if you," meaning the Standard Theater Company, "will take your goods away from here, and take them up where you can straighten and spread them out and examine them in your warehouse, neither you [meaning the Standard Theater Company] nor us [meaning the S. Y. T. Co.] and the ship, will waive any of our rights in the matter" or words to that effect?

A. I do not remember this conversation with the parties you mention at all. I am satisfied that I

(Testimony of William D. Wood.)

never said to anyone "I want you to take your goods away from here," or any words to that effect. But I did assent with some one representing the Standard Theater Company that the goods might be taken away as a matter of convenience for inspection, upon the understanding that our rights were not waived by that removal from our warehouse or premises.

Q. Well, they could not have been examined down there in your warehouse, Judge?

A. Oh, yes, they could.

Q. How could they? Was not that cargo piled clear to the top of that warehouse? A. Oh, no.

Q. Was it not piled on the outside along the alleyway, where you had your little railroad track?

A. There was more cargo than we could put in the warehouse at one time conveniently for inspection, but that cargo was coming off the ship I suppose for three or four days, and as it came off it was being inspected and delivered and taken away. The people were clamorous to get the goods and take them away, and we were handling the matter as a continuous stream of freight. We could have handled all the Standard Theater Company's cargo in the warehouse but it would have taken a little longer; it would have been a little less convenient for them; as a matter of fact this cargo did not represent, I suppose,

(Testimony of William D. Wood.)

more than one tenth or perhaps one fifteenth of the cargo we had on board the "Santa Ana."

Q The Standard Theater Company's cargo did not?

A. My impression would be now that it did not exceed one-tenth of the cargo.

Q. Did it not represent a little over half of the cargo?

A. I should be very much surprised if it did. That is a good while ago.

Q. What is the total tonnage of that cargo, the entire cargo?

A. I think the "Santa Ana" carried about 900 tons, measurement.

Q. Don't your bill of lading show that the Standard Theater Company's cargo amounted to 530 tons?

A. I do not know what the bill of lading shows; I have not seen it for a long time.

Q. Here are the footings.

A. No, these footings you show me here must be feet.

Q. It is the claim of measurement.

A. I notice these footings here and that must be feet, not tons. I do not remember, but it don't seem to me that the Standard Theater Company had much over a hundred tons on board.

(Testimony of William D. Wood.)

Q. Now, at this conversation that you testified to in chief, between yourself and Mr. Malloy, who was present at that conversaiton?

A. I cannot remember, there may have been half a dozen other persons present at that conversation, and there may have been only us three men.

Q. Who took part in that conversation?

A. That I cannot remember distinctly, because it is too long a time ago. All that I am absolutely positive about is that that understanding was definitely and clearly arrived at between us three.

Q. Between you and Mr. Gollin and Mr. Malloy?

A. Yes, sir.

Q. And you are satisfied that Mr. Gollin and Mr. Malloy heard everything that you have detailed here as a part of that conversation?

A. Yes, sir. I am satisfied they did.

Q. And they took part in that conversation?

A. Yes, sir.

Q. Now, was anyone else present?

A. Well, as I have said before, it is very possible there were others present, but I do not remember who were present.

Q. Where did this conversation take place?

A. I think it took place on the beach.

Q. When the goods were being landed?

(Testimony of William D. Wood.)

A. Or in our warehouse, yes; the goods had not commenced to be landed at that time from the "Santa Ana."

Q. They had not commenced to be landed at the time you had the conversation with Malloy?

A. No.

Q. Can you tell the date of that conversation?

A. No, I could not fix the date, except by other circumstances or events, but at that time I was handling that question with the shippers prior to the discharge of the goods. I perhaps—I would like to correct that answer as to the discharge of the goods. It may be possible that the goods were arriving on shore, being discharged from the lighters when we had that conversation, but we had not begun to deliver the goods to the consignees; they were still in our custody.

Q. Now, what was the arrangement that you had with Mr. Malloy with reference to the ascertainment of the damage?

A. Well, the arrangement was with Mr. Malloy that Mr. Malloy and Mr. Gollin were to proceed and go over that cargo of the Standard Theater Company, and ascertain if they could agree upon it as to what the damage was upon the different items.

Q. And if they could not agree, what would be the result or course of procedure?

(Testimony of William D. Wood.)

A. I do not know whether our conversation went that far or not or whether that question ever arose, because that emergency never did arise, so far as I know afterwards; but that perhaps did arise in other cases and was dealt with, if Mr. Gollin and the shipper were not able to agree at first. I think in some conversation I stated to Mr. Malloy and to the others if they were there, that in case they were not able to agree, that then before the goods were delivered, that an inspection would have to be made by each party and evidence of their condition and as to the damage was to be preserved.

Q. Well now, did you ever learn from Mr. Malloy, that he and Mr. Gollin had agreed?

A. As I stated before, I do not know that Mr. Malloy ever notified me to that effect. I simply knew from my observation and general talk with them, that they had completed their work under the arrangement.

Q. Completed the examination?

A. The examination under their arrangement.

Q. Did you learn from anybody connected with the Standard Theater Company and authorized to speak for the Standard Theater Company, that Gollin and Malloy had agreed?

A. I do not remember that I did.

(Testimony of William D. Wood.)

Q. Don't you know, Judge, that as a matter of fact that they did not agree?

A. I never knew that fact until I saw their claim in this suit when the papers were shown to me.

Q. Did not you know that when this matter had been referred by the Charles Nelson Company to Gibbs for adjustment in San Francisco?

A. No, I did not know it then.

Q. Were you not called in by the adjuster there for information as to the damage and the extent of it to that cargo?

A. Not that I know of; I think not, for I have no recollection of that general average adjustment there until along after it had been completed.

Q. Is it not a fact that you there gave to Gibbs and to Johnson and Higgins, a large part of the data upon which the adjustment was made, so far as the Charles Nelson Company was concerned, in San Francisco?

A. Yes, we were written to here a great many times to furnish bills of lading—copies of them, and things of that sort; but what use was made of them I do not remember.

Q. Don't you know and did not you know at that time that the Standard Theater Company was objecting to this so-called survey of Mr. Gollin's?

(Testimony of William D. Wood.)

A. No, I did not. I knew that a general average award was to be had at some time but I did not know that they were objecting to the award that Mr. Gollin was going to report.

Q. Did not you know before you left Nome, that Malloy and others interested in the Standard Theater Company, objected to the method which Mr. Gollin pursued, and the result of his examination and survey of that cargo? A. No, sir, I did not.

Q. You introduced Gollin to Malloy, you say, as the representative of the Insurance Companies?

A. Yes, sir, and also as the representative of our company and the ship.

Q. For the purpose of making an examination of these goods? A. Yes, sir.

Q. Did you say anything to Malloy about a general average adjustment?

A. I certainly think I did, but I cannot remember the use of that term.

Q. Did you ever at any time, in any conversation that you had with Malloy in Nome, ever use the words "general average" or any term of equivalent import?

A. I am satisfied I did.

Q. Is it not a fact that the only conversation that you ever had with Malloy, with reference to damages upon these goods and ascertaining of damages, was with reference to the claim of the Standard Theater

(Testimony of William D. Wood.)

Company against the insurance companies, from which the Standard Theater Company had policies?

A. I am satisfied; I am sure that is not the limit of our conversation.

Q. Was there ever any claim made or any pretense made by the Standard Theater Company or anybody connected with the Standard Theater Company, to you that the ship or the S. Y. T. Company was liable to the Standard Theater Company for anything, in Nome?

A. They never made any claim to us for any purpose, except the general claim that the goods were damaged—that everybody knew; they never brought to us any specific claim for any purpose.

Q. They never claimed any compensation?

A. That subject was never up between us as to who was liable but it was very distinctly a part of our arrangement that the damage that was to be ascertained was to be for any and all purposes, for which it might be necessary out here.

Q. That was the arrangement you had with Malloy? A. Yes, and Mr. Gollin.

Q. Now, you are clear, are you, Judge Wood, upon the statement that you gave Mr. Malloy to understand that this examination was to be had for the purposes of ascertaining the damage for any purpose for which it might be used?

(Testimony of William D. Wood.)

A. Yes, sir. I am clear, not only as to the conversation but also from the fact that the captain notified me that it was our duty to ascertain the loss, because this would be a case of general average, and also because we only—I went to Gollin as an insurance adjuster, and he also told me that it would be necessary to take a deposit to answer the claim of general average from every shipper. I went to Gollin in the first instance, primarily as an insurance adjuster. I heard there was an insurance adjuster in town, I will make that matter plainer. I had been in Nome ten days before the "Santa Ana" arrived—more than that, nearly twenty days—well, fifteen days, anyhow. I knew there had been a fire on board, because I had been on board the ship at Dutch Harbor, and I was looking about for some one to represent the interests that ought to be represented, and when I learned that there was an insurance adjuster in town I went to see him, and told him that there had been a fire on the vessel, and I wanted to secure his services. He told me that he represented the board companies, as I remember or the board of marine underwriters; and at that time he also advised me that it would be a case of general average as well; and so the idea of general average was just as clear and strong in my mind as the idea of insurance liability.

(Testimony of William D. Wood.)

Q. But you did not mention it to Malloy?

A. I feel sure that I did. I would like to add to that answer, that I am perfectly sure of this, that I did not use any expression which would tend to limit the purposes for which we were desiring to get the loss to an insurance liability.

Q. What did you ever do with the report of Gollin?

A. I have never seen the report of Gollin.

Q. Did he not make a report to you?

A. He did not.

Q. I thought you said that he issued certificates in duplicate, one to you and one to the shipper?

A. You are right, I did make that answer; but in the case of the Standard Theater Company, he made that report and kept it to be reported down here; and in case of the smaller shippers, we did preserve a lot of duplicates that were turned over to us; but this being a large and important case, and involving insurance, we left that matter with Gollin to be handled and reported here.

Q. Gollin was not representing anybody but yourself, was he? You employed him?

A. I employed him, but he was a representative, an official representative of the insurance companies.

Q. What insurance companies?

(Testimony of William D. Wood.)

A. The board companies that were represented by the board of marine underwriters, as I understood.

Q. Did the San Francisco board of marine underwriters, of which he claimed to be surveyor, own policies on that cargo?

A. As to that I do not know.

Q. Don't you know that they did not?

A. No, I don't either way. But I understood Gollin to be a representative of all the standard companies that were represented in this field, that was my general impression.

Q. Well, now, what did you do after this survey was made of the Standard Theater Company's goods, what did you do towards paying the amount of damage which you say Mr. Gollin ascertained that these goods had suffered?

A. We did nothing as to paying that damage, because that was not a part of our—that was not in our jurisdiction.

Q. What did you intend to do to, why did you want to ascertain the damage, unless you intended to pay it?

A. That had to be adjusted by general average.

Q. Did not you understand that general average adjustment properly has to be had at the point of destination of cargo?

(Testimony of William D. Wood.)

A. I suppose that would be the best place to handle it, but it could not be had in Nome.

Q. There were no facilities there?

A. No.

Q. Now instead of resorting to the examination or survey by Gollin, why did not you proceed and take testimony as to the extent of that damage?

A. For this reason—

Q. Take the depositions of witnesses?

A. For this reason: I believe that the best evidence of the amount of damage would be an agreement between the parties and if the parties could not agree, then it was our plan to take testimony.

Q. Did you take testimony in any case?

A. No, I did not. There were a few small cases in which there was a controversy between Gollin and the consignees, and it was brought to me, and in those cases I said to them: If you people cannot agree upon this amount, we will have to hold the goods here long enough to take testimony and have them inspected by representatives of the two points of view, so that the testimony can be preserved, and before that was done, in all cases, they came to agreement, making concessions, and as a matter of fact the taking of testimony was never resorted to.

Q. Now, instead of doing that, why did not you ask for a general average bond and deliver the goods?

(Testimony of William D. Wood.)

A. Well, I did not understand and did not see then how a general average bond would preserve the evidence that would be needed in a general average award as to the amount of loss.

Q. Well, a bond would not preserve the evidence, but it would preserve the security for a contributory share that would be assessed against that part of the cargo, would it not?

A. It would, but as I stated before, we waived a bond or deposit of security in cases that were insured, because we felt that the insurance company would answer for that. Now, we might have been mistaken in that as a mattter of law, but that was the reason on my part for waiving a deposit on insured goods, and as to goods that were not insured, as stated before, we dropped the deposit proposition as soon as Gollin concluded to allow a minimum award of ten per cent in all cases.

Q. Who was that minimum award to be allowed to?

A. To the consignee of the goods, the owner of the goods.

Q. Now, what provision was made for paying that minimum award?

A. As to the payment of the award, that was to be left to the general average court.

(Testimony of William D. Wood.)

Q. (Mr. POWELL.) And there was conceded a ten per cent minimum loss on the goods?

A. Yes, sir.

Q. (Mr. BRINKER.) Did you understand what were the necessary elements of general average adjustment, and what were to be considered by the adjuster?

A. I did not have a very clear idea; I had a general idea.

Q. Now, you knew, did not you, that the ship had not sustained any damage from the sacrifice that had been made to put out that fire?

A. Yes, I knew the damage was very slight to the ship.

Q. You knew that the cargo had sustained the bulk of the damage growing out of the efforts to put out that fire? A. Yes, sir.

Q. Now, you knew, if you knew anything about the law of general average, you knew that the ship would have to contribute to the cargo, rather than the cargo to the ship, did not you?

A. I knew the ship would have the principal portion of that loss to pay, but I also knew that every item of saved cargo would have something to pay toward the lost portion. It might be a very slight percentage, but that there would be something.

(Testimony of William D. Wood.)

Q. But you knew the greater part would fall on the ship? A. Oh, yes, I knew that.

Q. Now, what provision did you make, or did you intend to make by this arrangement you testified to, for paying the ship's contributory share?

A. That was a question as I understood, between those who sustained the loss and the owners of the ship, or the ship itself, down here. I understood that they would have a lien on the ship and have a share of the loss.

Q. What inducement was there held out to these people, the owners of the cargo, to enter into any agreement as to the amount of the loss, if they were not to be paid, when the amount was ascertained?

A. No inducement, except that it would be for the advantage of all parties to preserve evidence or arrive at a determination of what the loss was, so that the claims could be paid down here in the proper manner.

Q. Now, did you understand that Gollin was an expert and competent adjuster?

A. I did; yes, sir.

Q. When you employed him did you instruct him what his duties would be in the examination of the cargo of the Standard Theater Company?

A. I gave him no instructions, except that I desired him to ascertain what the actual loss or damage was.

(Testimony of William D. Wood.)

Q. Did you tell him to make an examination so that the adjustment in general average could be segregated from the adjustment of any particular average?

A. No, I did not, because I felt sure he understood what would be required along that line.

Q. And if, as you say, he and the cargo owner were to agree upon a particular amount of damage, how was that agreement to be manifested, did you instruct him to take a written agreement from the cargo owner?

A. No, I did not. I do not think in any case we took a written agreement from any shipper.

Q. Did you instruct him in dealing with the representatives of the Standard Theater Company, that if they agreed on any items of damage, to preserve written evidence of that in the form of a written agreement? A. No, I did not.

Q. Why did you not?

A. For this reason. I really regarded what they did as evidence of loss. I was not seeking to preserve a written contract with any shipper; in fact, in almost a hundred cases of other shippers, for there was a large number of other shippers of small shipments, the only evidence we took in any case, was the certificate of Gollin, as far as I remember

(Testimony of William D. Wood.)

I do not think we asked any shipper on that vessel to sign anything.

Q. How were you going to prove that there had been an agreement upon the amount of damages unless you preserved some evidence of it, in addition to the statement of your own employee, Mr. Gollin? It would still be a question as to whether they had agreed or not?

A. Well, that might be a question of law, but my—

Q. Well, it is a question of fact.

A. Well, my understanding at the time was, and my judgment still is, that if Mr. Gollin and the owner of goods agreed on the amount there on the ground as to the loss when they inspected the goods, that that would be conclusive.

Q. How would you preserve evidence of that agreement, if you did not tell Gollin to reduce to writing and have the parties sign it?

A. Well, I did not suppose there would be any controversy on the question of their inspection. I suppose if Gollin made a certificate, and furthermore, the arrangement itself was that these goods should not be taken away until that was accomplished, and the fact of the removal of the goods would be evidence that that adjustment had been completed.

(Testimony of William D. Wood.)

Q. Evidence of whom?

A. Well, it would be evidence to me and to our company, because in all cases the delivery of the goods was proceeded with upon the theory and upon the understanding that they were not to be taken, no delivery until the question of damage had been ascertained.

Q. Is it not a fact that the delivery of these goods to the Standard Theater Company was absolutely unconditional, and delivery to them at the time the bills of lading—

A. We did not deliver the goods unconditionally. I have no doubt we did deliver to them the bill of lading, because we understood that these when they were taken away, that the delivery of these goods was complete. I never—

Q. When they were taken away from the S. Y. T. Co.'s warehouse?

A. No, when the inspection was completed, so far as the goods were taken away and sold by them from the beach, when they left us, our custody in that way, it was a final delivery. As to the goods that were taken to their warehouse, the delivery became final when they completed their inspection and appraisement of the loss.

Q. How were you to know that?

(Testimony of William D. Wood.)

A. Mr. Gollin was our representative in that matter, and whenever he completed with them the inspection of any goods and they took them, that was final delivery.

Q. Why did not you ascertain from them whether Gollin reported the truth about it?

A. Why, I had not any reason to question that Mr. Gollin's report would be accurate.

Q. Did you put anybody in charge of these goods in the warehouse of the Standard Theater Company?

A. I did not.

Q. And do you want the Court to believe now, that you delivered the goods of the Standard Theater Company conditionally, with a string to them, and that if Mr. Gollin and the Standard Theater Company did not agree upon the amount of damage, they were to be returned to your custody?

A. Yes, sir.

Q. And you state that was the arrangement with Malloy?

A. No, that was not expressly, it was not expressly put in the language, but it was clearly understood between us that the delivery of the goods that were taken to their warehouse was conditional and that the rights of nobody should be prejudiced by that conditional delivery.

(Testimony of William D. Wood.)

Q. That was with reference to the amount of damage?

A. Yes, sir; because that was the only condition that remained in the final delivery of the goods; the freight had been paid. But as to our failure to maintain the custody of these goods in the warehouse, I would like to say here, that I was entirely willing to trust the Standard Theater Company—Mr. Malloy, upon the basis of our understanding with them. I was perfectly willing to take that risk.

Q. And you are clear that the only arrangement you ever had was had with Mr. Malloy and Mr. Gollin, and they were the only two people that were present besides yourself, participating in that arrangement?

A. No, I am not clear that they were the only two people, as I say—

Q. They are the only ones that were participating in it?

A. I would not absolutely say that, Judge. The man that I felt that I was dealing with in the matter was Mr. Malloy. There were other people there interested as proprietors in that company, to what extent and in what official position I did not know; but Mr. Malloy was the secretary and treasurer, as I understood, of the company, and the one who was actively handling the details of the business.

(Testimony of William D. Wood.)

Q. Did not you know that Mr. L'Abbe was president of the company and was there in Nome at the time?

A. Yes, I think I did know, that is my understanding, that he was president.

Q. Did you ever talk with him with reference to the arrangement as to how this damage should be ascertained?

A. I don't know that I did. But I saw L'Abbe there frequently and I expect I have spoken of the goods and the loss to different ones there during the time, during the week perhaps that they were being taken away, a number of times.

Q. T. J. Considine, you knew him, did you not?

A. Well, I do not think I knew him personally. I knew him by sight. We had a speaking, a passing acquaintance.

Q. He was vice-president of the company, was he not?

A. Well now, I don't know as to that; I don't know, he might have been. I cannot say that others did not participate with Mr. Malloy in that conversation, the arrangement to which I refer as the principal conversation.

(Testimony of witness closed.)

At this time a recess was taken until 2 o'clock P. M., this day.

(Testimony of George O'Riley.)

It is admitted by both parties that Judge Wood would testify that the pending freight on that voyage was three thousand four hundred twenty-seven dollars and seventy-two cents.

AFTERNOON SESSION.

Continuation of proceedings pursuant to adjournment at 2 P. M.

Present: Mr. BRINKER, Proctor for Libelant.

Mr. POWELL, Proctor for Claimant.

Mr. GEORGE O'RILEY, a witness called on behalf of the claimant, being duly sworn, testified as follows:

Q. (Mr. POWELL.) Were you in Nome in the summer of 1900?

A. Yes, sir.

Q. Were you there at the time the "Santa Ana" arrived from Seattle? A. Yes, sir.

Q. Did you purchase from the Standard Theater Company any of the whisky in barrels, that was in the cargo of that vessel?

A. I bought some from Mr. Malloy; he was representing the Standard Theater Company, I believe.

Q. That was W. A. Malloy?

A. Yes; he always signed the receipts.

Q. How much did you purchase?

(Testimony of George O'Riley.)

A. Well, I do not recollect exactly, but I think somewhere between ten and fifteen barrels; I think it was fifteen but I would not care to say; I think it was between 10 and 15; I think it was 15 barrels altogether.

Q. What was the quality of that whisky?

A. Oh, it was fine goods.

Q. Did it give any evidence of having been injured by fire?

A. Not at all, no, sir.

Q. Now, did it give any evidence of having leaked any out of the bungholes?

A. No, sir.

Q. In the summer of 1900 what could you buy whisky for in Nome?

A. Well, buy it from, including July, August and September, why you could buy it for—I believe Malloy sold me his at invoice price at that time, if I recollect right; I cannot recollect what I paid for it.

Q. What could you buy it for at other places?

A. Well, the first two months of the season, the town was pretty well stocked and I have bought Scotch whisky and case goods and things of that kind at less than cost, at less than Seattle prices.

Q. How about barrel goods?

A. Barrel goods I bought for the same price that

(Testimony of George O'Riley.)

I could lay them down myself, the regular cost price, and I did buy some for less than cost too; I understood at that time there was lots of it there. I was well stocked up when I first went in and I did not have occasion to buy it until a great deal of it had come back to Seattle.

Q. What business were you in?

A. Liquor business.

Q. Wholesale or retail?

A. Well, we were retailing.

Q. I will ask you, Mr. Riley, whether or not barrel whisky does not shrink some, from what they call outage, from what is called outage?

A. Oh, yes; there is always a decrease in the stock in the barrel.

Q. Is there a regular scale of outage in the trade?

A. Well, yes, generally averages about the same. I am not positive right to the scale of outage there is on it. In my case where I handled goods, a fifty gallon barrel, it runs from five to eight gallons on each barrel.

Q. Which means that it is five to eight gallons short of the official gauge?

A. Of when it was put in bond.

Q. Of the official gauge? A. Yes, sir.

Q. Per barrel? A. Yes.

Q. How long were you in Nome?

(Testimony of George O'Riley.)

A. I got there, I believe, about the latter part of June and I left there the year following, the next October. I was there about 16 or 17 months.

Cross-examination.

Q. (Mr. BRINKER.) What did you pay for the whisky that you bought from Malloy?

A. Well, sir, I cannot remember; I think it was somewhere between $2.25 and $2.40 per gallon. I think it was in the neighborhood of $2.25.

Q. How many barrels do you say you bought?

A. Between 10 and 15 barrels; I don't remember; I think it was in that neighborhood.

Q. How much were they short?

A. Well, the first lot that Malloy sold me, the first three barrels, I think from the first bill to me—I did not see the original bill you know; they were short, as near as I can recollect, about 30 gallons. 27 to 28 gallons as I recollect, they were short. From the last, from the invoice that he made me, I did not see the original, I don't know what they were. I believe 33 or 34 or 35, and they should have been 41, as I recollect. I know we had quite a squabble over it up there.

Q. There should have been 41?

A. I don't know; that is what they were billed to me, and I think they were billed between 38 and 41 gallons; 38 to 43 gallons; and as I recollect they were

(Testimony of George O'Riley.)

regauged, and there was 33 to 34 gallons. They ran out so quick I wondered and I says to Malloy, aren't you giving me a little bit the worst of it, and I went to work and drew off the others, and I found out I was paying a damned good price for the whisky, instead of getting it cheap, and I did not feel like standing it.

Q. When did you buy that whisky?

A. Well, it was in the summer of 1900.

Q. Do you remember what time?

A. No, I don't remember the months; I think it was along in August; it might have been in July. No, it was August or September.

Q. What did you say you paid for it?

A. I cannot recollect. I think about $2.25 a gallon, as near as I remember.

Q. What would that same kind of whisky sell for in Seattle?

A. About the same price I paid, I should judge.

Q. Well, you bought that at the time Malloy was peddling it around, trying to get rid of it, did not you?

A. Well, I don't know that he was trying to peddle it; no. I went up to his place one day and he told me he would like to get rid of the whisky, and he said he would give me a bargain, if I wanted it. He had it there and it was dead stock.

(Testimony of George O'Riley.)

Q. He told you he would give you a bargain and he wanted to get rid of it?

A. Yes, and I bought quite a lot of it, because I thought I was getting it at a bargain. The whisky was very nice.

Q. You thought you were getting it below the market?

A. I knew I was not paying more than what I would have to if I bought it south and shipped it.

Q. You could not have gone to the N. A. T. & T. Co. or the Alaska Commercial Company, and bought the same goods at the same price?

A. No, sir, not within fifty cents a gallon.

Q. Did you buy anything else besides barrel goods?

A. I believe I did buy a case of vermouth, that was no good. I remember that the corks were all blown out. And I think I got one of those syphon bottles, but it was absolutely no good. The case goods I got; I got some cherries and they were all blown out.

Q. Spoiled?

A. Yes, the tops were blown out. Of course, I used a good deal of that stuff, because in a saloon you can use less or more with the class of trade I had; it was a working class, and where they were

(Testimony of George O'Riley.)

not actually spoiled—they were spoiled for the market.

Q. You could not put them on the market and get anything for them?

A. Not anywhere near the price I got them for; I got them very cheap from Malloy, as I remember.

Q. (Mr. POWELL.) You speak of its being the first three barrels you got being some 27 gallons short. That amounted to seven gallons on each barrel?

A. Yes, sir.

(Testimony of witness closed.)

At this time hearing adjourned until May 1, 1905, at 10 o'clock A. M.

Seattle, May 1, 1905, 10 A. M.

At this time, by agreement of the parties, further hearing adjourned until such time as the parties should agree to proceed.

Seattle, Washington.
2 P. M., Tuesday, May 9, 1905.

Present: Mr. BRINKER, for Libelant.

Mr. POWELL, for Claimant.

Continuation of proceedings pursuant to agreement as follows, to wit:

Mr. POWELL.—I want to recall Mr. Malloy for one or two questions at this time.

Mr. W. A. MALLOY, a witness on behalf of libelant, on the stand for further

Cross-examination.

Q. (Mr. POWELL.) Referring to the barrel of whisky in the cargo: Mr. Malloy, do you know whether it was what is known as single stamp or double stamp, goods?

A. I think it was all double stamp, Mr. Powell. I think it was all bought for double stamp. Mr. Considine—Mr. John Considine—ordered all that liquor, I didn't have anything to do with ordering it.

Q. Do you know what the difference between single stamp and double stamp goods is?

A. Yes, sir.

Q. The double stamp goods, as I understand it, are goods where the barrel has not been broken since it was distilled and put in bond?

A. How is that?

Q. Double stamp goods indicates whisky in barrels that has not been broken since it was put into the barrel and originally distilled, left in bond, as I understand it?

A. Well, I couldn't say as to that. What I mean that I knew the difference, double stamp goods is better goods than single stamp goods.

Q. Yes, supposed to be? A. Yes, sir.

(Testimony of witness closed.)

Mr. M. A. GOTTSTEIN, produced as a witness for and on behalf of claimant, having been first duly cautioned and sworn, testified:

Q. (Mr. POWELL.) Mr. Gottstein, are you familiar with the liquor business? A. I am.

Q. How long have you been in that business?

A. Twenty years.

Q. What is the difference between single stamp and double stamp goods?

A. Why, double stamp goods is goods that the Government allows to be put in a bonded warehouse and kept up to a period of eight years, and it attains its first stamp when it goes into the warehouse, called the warehouse stamp, and when it comes out it attains the tax stamp, thereby deriving its name of "double stamp."

Q. I will ask you, Mr. Gottstein, whether whisky that is stored in barrels loses any in bulk with time.

A. It does.

Q. Is there any regular amount of loss that the Government allows

A. Yes. The Government has a scale of allowances—a maximum allowance for seven years. The maximum allowance for seven years is something in the neighborhood of twelve gallons.

Q. Per how much? A. Per barrel.

Q. How many gallons is a barrel of whisky supposed to contain?

(Testimony of M. A. Gottstein.)

A. They run from forty-seven to fifty gallons, Kentucky whisky.

Q. What causes that shrinkage?

A. Well, the volatile character of the article and some of it is caused by absorption of the wood.

Q. Absorption and evaporation? A. Yes.

Q. Do you know whether whisky that is stored in barrel in a warehouse is, as a general practice, subject to any artificial heat?

A. There are distillers that use steam—steam-heated warehouses.

Q. What is the object of that?

A. To expedite the maturity by hurrying the evaporation of the fusil.

Q. Now, as a whisky evaporates or shrinks that way from evaporation does the quality improve or deteriorate? A. It improves.

Q. Now, the whisky here in controversy, Mr. Gottstein, was in the hold of the steamship "Santa Ana" while she was making a voyage from Seattle to Nome, and while on the voyage there was a fire broke out in the hold and an attempt was made to suppress that fire by pouring water into the hold, which was apparently not successful, and then live steam was turned into the hold, with the hatches battened down, to put out the fire. Assuming now that there was steam turned into the hold, live steam, under pres-

(Testimony of M. A. Gottstein.)

sure of two hundred to two hundred and forty pounds pressure to the square inch for fourteen hours, would that, in your opinion, cause any perceptible loss to the bulk of the whisky—perceptible loss in bulk?

A. That is a question I am hardly able to answer. I have never had anything come under my experience of that kind. The distillery warehouses have steam-heated pipes running through them; I do not know what the pressure is or anything. This would be rather an abnormal proposition.

Cross-examination.

Q. (Mr. BRINKER.) Mr. Gottstein, you have testified that the double stamp on barrels of whisky indicates whiskies that received one stamp when they went into the bonded warehouse, and one stamp when they were released from bond. Now, I will ask you whether the fact that the barrels were double stamped would necessarily show what length of time they had been in the bonded warehouse.

A. They would.

Q. It would show it upon the date of the stamp?

A. Yes.

Q. The date of their relase from bond would be put upon the stamp? A. Yes.

Q. Could goods be received into a bonded warehouse and stamped and released at any time short of

(Testimony of M. A. Gottstein.)

the eight-year period and stamped so as to become double stamped goods? A. They would be.

Q. Now, I will ask you if the fact that the goods were double-stamped is any indication of how long they had been in bond?

A. No, the fact that they are double-stamped would not be an indication. It would require an inspection of the stamps.

(Testimony of witness closed.)

Mr. POWELL.—I now offer in evidence the Government scale of amount of loss allowed on whiskies in bonded warehouses at the time of regauge and withdrawal.

(Paper referred to offered in evidence, marked as Claimant's Exhibit "A," and returned and filed herewith.)

And thereupon an adjournment was taken to some date to be hereafter agreed upon by proctors for the respective parties.

Mr. POWELL.—I also offer in evidence proof of loss of goods of Standard Theater Company, an affidavit made at Nome, Alaska, dated 6th day July, 1900, attached to said proof of loss.

Mr. BRINKER.—I object as incompetent, irrelevant and immaterial, and for the further reason that it was not called to the attention of the witness Mal-

(Testimony of F. G. Peterson.)

loy, when he was on the stand, and cross-examined as, to wit, and because it would only be competent for the purposes of impeachment, after such cross-examination, and no such cross-examination was had.

(Paper marked Claimant's Exhibit B, filed and returned herewith.)

Seattle, Wn., August 15, 1905, 2 o'clock P. M.

Continuation of proceedings pursuant to agreement.

Present: Mr. BRINKER, Proctor for Libelant.
Mr. POWELL, Proctor for Claimant.

LIBELANT'S REBUTTAL.

Mr. F. G. PETERSON, recalled on behalf of the libelant, in rebuttal, testified as follows:

Q. (Mr. BRINKER.) Mr. Peterson, you were at Nome at the time of the arrival of the "Santa Ana," as you have testified?

A. Yes, sir.

Q. Do you remember Mr. Gollin, there?

A. Yes, sir.

Q. Were you present when he made a survey of the goods of the Standard Theater Company in their warehouse in Nome?

A. Yes, at the time it was taken in the big tent.

Q. Now, who was present while he was making that examination? A. Me and Mr. Malloy.

(Testimony of F. G. Peterson.)

Q. State what Mr. Gollin and Mr. Malloy did with reference to that examination as nearly as you can.

A. Well, I opened a few boxes and Gollin saw them and that was all. He was looking for all the—well, of course they were piled clear up, 12 or 14 feet high, you know, and there was nothing gone through except he looked for boxes that were broken and burned, or that were scorched, that was all that were—we opened a few boxes.

Q. Did you hear any agreement between Mr. Gollin and Mr. Malloy as to the amount of damage on any of these things? A. No.

Q. What was said, if anything, by Mr. Gollin as to the amount of damage on any article, and what did Malloy say with reference to it?

A. Well, I could not state what was said, except that I know there was quite a little difficulty between the two sometimes, because Malloy he objected to the prices that he said, whatever they were, and so that is all I know.

Q. Did you hear any agreement at all between them? A. No, sir, I did not.

Q. What examination, if any, did Gollin make of the goods that were damaged by the water and steam?

A. Well, I don't know—he looked more for the burned stuff there; they were piled aside, a good deal

(Testimony of F. G. Peterson.)

of it—some of it was piled aside, and whereas all the rest was piled in big piles. All he was looking for seems like whatever was broke open or something that was scorched.

Q. Did he state who he was representing, in your presence?

A. Why no; no, he did not state who he was representing; I did not hear that at all. All I heard, Malloy said he was an insurance man.

Q. You need not state what Malloy said, unless it was in the presence of Mr. Gollin. A. No.

Cross-examination.

Q. (Mr. POWELL.) Did Malloy ask Gollin to come over there and examine and find what he—

A. Well, I—well, that was the second day Malloy was not satisfied with the examination, and he says, "Why, Malloy, it would take about two months to put through this cargo"; and he says, "I haven't time here to stay here all summer"; so I guess he was there about three or four days in all.

Q. What did Malloy say to that?

A. Malloy, he says, "There is no sense in this; this ought to be looked through"; so that is all he said.

Q. What?

A. That is all he said that I heard.

(Testimony of F. G. Peterson.)

Q. Malloy was in something of a hurry to be able to take his goods away, wasn't he?

A. Oh, no; I don't think he was in a hurry to take his goods away. He liked for to get the judgment right, according to what I understood. He was not satisfied.

Q. What were they making this examination for, did you hear him say?

A. No, I don't know what they made it for, except insurance; that is what I understood, that is all.

Q. How long was Gollin making this examination?

A. Oh, I could not exactly remember that, three or four days he was there; part on the forenoon and part on the afternoon.

Q. Did Malloy ask him to break open any packages that Gollin did not break open?

A. No, but he said that we ought to go through it all. He says, "There are things here that are spoiled and I know it. I broke open a few boxes."

(Testimony of witness closed.)

W. A. MALLOY, a witness recalled in rebuttal on behalf of the libelant:

Q. (Mr. BRINKER.) Mr. Malloy, you testified that you knew Mr. Gollin who made the survey of the goods of the Standard Theater Company, at Nome?

(Testimony of W. D. Malloy.)

A. Yes, sir.

Q. Mr. Gollin made that survey and made an estimate of the damages that the goods had sustained, and gave you a certificate of it, did he not?

A. Yes, sir.

Q. Mr. Gollin testified in his deposition taken by claimant in this case, that you and he agreed upon the amount of the damage that the goods had sustained, as that damage was appraised by him. State whether that is true or not.

A. No, sir—we did not agree to it.

Q. During the time that that examination was being made, who was present?

A. Mr. Peterson was present; Mr. Lane was in there, not present all the time, but at times he was in there.

Q. Now, in making the examination by Mr. Gollin and ascertaining in the manner in which he did, the amount of the goods that were damaged, the amount the goods had been damaged, what did Gollin do?

A. Well, he would just look over the goods, and he seemed to look for goods that were scorched or burned; at the time we supposed we had a fire insurance policy all the time, and the part of the goods that were not scorched or burned he would pass on as all right; and anything that would be burned or scorched, he would say, "Well, ten or fifteen or twen-

(Testimony of W. A. Malloy.)

ty or thirty per cent damage," and I kept objecting, all the time, to it.

Q. You objected to it? A. Yes, sir.

Q. Did you agree to any estimate that he put on any of the goods, at any time?

A. No, sir, none whatever.

Q. I will ask you to state whether you called his attention to the condition of the goods that had not been scorched or burned, but were damaged by water or steam? A. Yes, sir.

Q. What did he say about these?

A. Well, he passed on them as some damaged and some not damaged.

Q. What did he say about what he was there for?

A. He said he was there to adjust the goods, make a survey of the goods, and he said he was representing the insurance companies.

Q. Now, Mr. Gollin testified in his deposition that you showed him the goods that there was to appraise; that you pointed out the particular goods that he was to appraise. State whether that is true?

A. No, sir; I never done that; I showed him all the goods in that tent and he passed on them. As I said before, lots of the goods were found damaged twenty per cent afterwards; he passed on them as being all right; they did not show as being scorched or burned; I kept objecting to it all the time.

(Testimony of W. A. Malloy.)

Q. He also states that "And we agreed between us [that is, you and he] on the amount of damage on the value of the goods at Seattle prices."

A. No, sir, never done it. Never agreed on anything.

Q. He was asked this question: "When you stated the amount the goods were damaged, did Malloy agree that was correct?" Answer: "Not always, but we got together and we finally agreed." Is that true? A. No, sir.

Q. Then he was asked this question: "And did you finally come together and agree?" And his answer was "Certainly." Is that true?

A. No, sir.

Q. He was asked this question, "Did Malloy ever agree to every one of the figures that were placed in your report?" His answer was, "Most certainly he did." Is that true?

A. It is not correct, no, sir.

Q. What did you understand your policy covered, what did the damage cover?

Mr. POWELL.—I object as incompetent, irrelevant and immaterial.

A. Fire insurance policy, we thought we had all the time; that is we had a certificate, we did not have the policy with us, and we always thought it was a fire

(Testimony of W. A. Malloy.)

insurance policy issued to us; never figured on anything else.

Q. What else did you understand that fire insurance policy covered?

Mr. POWELL.—I object as incompetent, irrelevant and immaterial.

A. The goods that were purchased—for the goods of the Standard Theater Company.

Q. The examination being made by Gollin at that time, what loss did you understand was covered by your policy? A. The fire loss.

Q. State whether or not you included in the fire loss the loss that the goods sustained in the effort to put out the fire?

Mr. POWELL.—I object as incompetent, irrelevant and immaterial.

A. Well, that caused by steam and water and one thing or other, I supposed it was covered by the fire insurance policy.

Q. What I am trying to get at is, what that understanding was when you were making the examination, what this examination was for and what else your policy covered? As I understood, you testified that Gollin told you he was representing the insurance company? A. Yes, sir.

Q. And you supposed it was an examination made in the interest of the insurance companies?

(Testimony of W. A. Malloy.)

A. Yes, sir.

Q. Now, Mr. Malloy, you know Judge W. D. Wood? A. Yes, sir.

Q. He was at Nome representing the steamship "Santa Ana," was he not? A. Yes.

Q. Well, he has testified in this case as a witness on behalf of the claimant; and he testified that he delivered this cargo of goods to the Standard Theater Company conditionally; that is, as he puts it, the goods were delivered to you and removed to the Standard Theater Company's warehouse, and they were constructively in his possession. State whether that is so or not.

A. No, sir; never heard of that; it is not true.

Q. State how you came to accept the delivery of the goods.

A. Well, Mr. Wood came to me one day; they were unloading the goods and had a lot of the goods strung along each side of the track, barrel goods.

Q. What track do you refer to.

A. The little track running from the shore to the warehouse. Had the barrel goods and the bar fixtures, piano, a lot of corrugated iron—all heavy stuff was lying along each side of the track; the warehouse was full at the time. Some of our light goods were packed clean up to the top of the tent, the ceiling, the top of it, in one corner and another pile of goods piled

(Testimony of W. A. Malloy.)

all around. Some of our goods, as I said before, looked like a lot of old junk. So Wood says to me, he says: "I got Mr. Gollin here, an adjuster, who will adjust this matter," and he says: "By the way," he says, "you have got a warehouse down there, a big house or big tent, or something; you could take the goods down there, and," he says, "it would do me quite a favor; I haven't got room here." The warehouse was full and they were strung all along the track. So I asked him if I would lose any right by taking them down, and Gollin was present at the time, and Wood introduced me to Gollin, and he says: "No, you will not lose any rights if you take the goods down there, and it took a week or so to take them down, and then I went after Gollin and I tried to get Gollin to hurry the matter up, and I went after him for two or three days, and he could not attend to it then; but later on he came; he came and went over the goods and put in an hour in the forenoon and an hour and a half probably in the afternoon; one day he did not show up at all, that is one afternoon. He came in the forenoon and put in about an hour. After I went after him for two or three days, and he would not come, he did not have time or something; that was the time I told him to hurry the matter up and I presented him with a hundred dollar bill.

Q. Now, at the time Judge Wood asked you if you

(Testimony of W. A. Malloy.)

could not take your goods up to the Standard Theater Company's warehouse, how was his warehouse with reference to being filled with goods or otherwise at the place where the goods were being landed?

A. The warehouse was packed with goods; they could not get any more goods in. There was just a little pathway you could hardly get through.

Q. Was there any room in that warehouse belonging to Judge Wood in which these goods could have been spread out and examined?

A. No, sir, none whatever.

Q. Were or were not all of the goods that had been landed on the beach in that warehouse?

A. No, sir, they were strung along on each side of the track. Most all our heavy goods were.

Q. Was there any room in the warehouse for them at that place? A. No, sir.

Q. Had you sold or did you sell any goods from the beach? A. None whatever.

Q. Did Judge Wood say anything to you about making a deposit on account of the Standard Theater Company, on account of the goods?

A. No, sir; never heard of it.

Q. Did Judge Wood or anybody else ever say anything to you about an adjustment in general average on this cargo?

A. Never heard of general average; no, sir.

(Testimony of W. A. Malloy.)

Q. Never heard of it?

A. Never heard of it.

Q. And did Judge Wood, or anybody representing the "Santa Ana" or the transportation company, take or demand a general average bond or agreement from you or the Standard Theater Company, for any damage on these goods? A. No, sir.

Q. Or anybody else?

A. No, sir, never heard of it

Q. Was there any agreement made between you and Judge Wood and Gollin, that Mr. Gollin should examine or make a survey of the goods of the Standard Theater Company, and that he and you should agree upon the amount of damage these goods had sustained? A. **No, sir.**

Q. Judge Wood testified that you never made any complaint to him that the adjustment of the loss of the Standard Theater Company had been faulty or defective. Did you understand from Judge Wood, or any conversation that you had with him or Gollin, that you were to make any objection or complaint to him if Gollin's adjustment was not satisfactory to you? A. No, sir.

Q. At the time Judge Wood introduced Gollin to you, state what Judge Wood said.

A. Well, he said: "I wish you two would get together and take these goods down to your warehouse;

(Testimony of W. A. Malloy.)

you have got plenty of room down there and," he says, "go over the matter and have the goods adjusted; Mr. Gollin will adjust the goods; he represents the insurance company," and that is about all.

Q. What did you understand about adjusting the goods?

A. He was to go over and see what the amount of damages was.

Q. Then did Judge Wood say what was to be done after he, Gollin, ascertained what the damage was?

A. No, sir, I never heard of it.

Q. Did he say anything to you at that time what should be done? A. No, sir.

Q. Judge Wood testified that all of the shippers of the cargo, known as the cargo on board the vessel, the "Santa Ana," were notified that they could not have their goods unless they made a deposit to cover general average; that Gollin had specified one to ten per cent of the value of the goods, until the damage to the goods had been determined. Now, was there any such statement as that made to you or anyone in your presence in behalf of the Standard Theater Company?

A. No, sir; never heard of it. There was a report that there was a lot of people—that he wanted a lot of people to take their goods away, and they abandoned them and they would not touch them at

(Testimony of W. A. Malloy.)

all; they were all soaked up and looked like a lot of old junk; I never knew of any goods leaving the warehouse whatever. No agreement of that kind, or the ten per cent payment, never heard of it.

Q. Did Judge Wood state to you or in your presence that unless the amount of the damage was agreed upon by you and Mr. Gollin that each party would have to proceed and preserve his own evidence of the damage which he believed to exist, for settlement down here, meaning in the states, or words to that effect? A. Never heard of it, no, sir.

Q. Did he make any such statement or any similar statement to you?

A. No, sir none whatever.

Q. Judge Wood testified, "And I stated to Mr. Malloy that it would be necessary, before the goods could be delivered, before we had any right to deliver the goods, that the amount of loss should be ascertained and that I had employed Mr. Gollin, who was an insurance adjuster, to go over the goods as they came ashore and that he would be the representative of the ship and of our company as the charterers and of the insurance companies in that investigation." State whether he ever made that statement to you.

A. He never said anything about the ship; I never heard that at al. He said Gollin was an ad-

(Testimony of W. A. Malloy.)

juster representing the insurance companies, in that conversation, that is all I heard him say.

Q. And he further testified: "And that I desired them to take the matter up together and go over the goods as they came ashore and find what the loss was, and that if they agreed on the loss, or as they agreed on the damage, why the goods could be delivered." Did he make any such statement as that to you?

A. None whatever; I never heard of it.

Q. Did he make this statement to you: "That as to the deposit that would not be necessary in either case, because their goods were insured and we were willing to look to the insurance company for any general average award that might be made against the cargo"? A. Never heard of it; no, sir.

Q. "Mr. Malloy assented to the suggestion of going over the goods with Mr. Gollin."

A. No, sir; never.

Q. Now, Judge Wood further testifies that, "The substance of the arrangement that is in my mind; but he assented to the arrangement and assented and agreed to go over the goods with Mr. Gollin for the purpose of finding out what the loss was; and from that time on I left the matter in their hands." State whether you made any such agreement as that.

A. No, sir.

Q. Now, he further testifies that the suggestion

(Testimony of W. A. Malloy.)

that the removal of the Standard Theater Company's goods came from the Standard Theater Company, and did not come from him. State whether that is true.

A. No, sir, that is not true; it came from Mr. Wood.

Q. Was there anything ever said to you by Judge Wood of a ten per cent damage on your own or any other shipment? A. Never heard of it; no, sir.

Q. Were you present at a conversation between Judge Wood, Mr. Lane, T. J. Considine and Mr. L'Abbe? A. No, sir.

Q. You were not there? A. No, sir.

Q. Now, Mr. Malloy, you said that you sold these goods by the gauger's certificate? A. Yes, sir.

Q. There was some testimony from witnesses on the part of the claimant, as to the amount of outage that the goods would naturally sustain. Have you that gauger's certificate? A. Yes, sir.

Q. That is not the original gauger's certificate?

A. No, sir.

Q. That is a copy of it?

A. This is a copy of it.

Q. What became of the one you had up in Nome and which you used at the time you sold these barrel goods?

(Testimony of W. A. Malloy.)

A. I don't know. It was lost or something; mislaid or something. I never could find out what became of it.

Q. Did you make any effort to find it?

A. Yes, sir, several.

Q. But you could not find it? A. No, sir.

Mr. BRINKER.—In view of the fact that we have not the original which Mr. Malloy had in Nome, I wrote to the Crown Distillery Company in San Francisco, from whom the goods were purchased and asked them to send to Kentucky to the gauger and get a duplicate of his certificate; and there is the duplicate with the letter to me.

Q. I will ask you if this paper, which I now hand you, is a copy of the gauger's certificate which you had in Nome at the time you have testified you sold sold the barrel goods by the gauger's certificate?

A. To my knowledge and best belief that is a copy.

Q. You have examined it, have you?

A. Yes, sir.

Q. Now I think you stated in answer to Mr. Powell the other day, that these were what is known as double stamp goods? A. Yes, sir.

Q. I think the testimony shows, the testimony of Gottstein shows that the goods were stamped when put in bond and then when they are taken out of bond

(Testimony of W. A. Malloy.)

another stamp is put on them and that makes double stamp goods? A. Yes, sir.

Q. And at the time the double stamp is put on the contents of the barrel is gauged or ascertained?

A. Yes, sir.

Q. And this certificate shows what that regauging is? A. Yes, sir.

Mr. BRINKER.—We offer this paper in evidence.

Mr. POWELL.—I object as incompetent for any purpose.

Mr. BRINKER.—You do not object because it is a copy?

Mr. POWELL.—Yes, I do, because there is no proof that it is a copy.

Mr. BRINKER.—I offer it with the letter attached.

Mr. POWELL.—I object to the letter as incompetent.

(Paper marked Libelant's Exhibit ——, filed and returned herewith.)

Q. Now, you stated before that you sold these barrel goods according to the gauger's list?

A. Yes, sir.

Q. That is what you meant by that?

(Testimony of W. A. Malloy.)

A. Yes, that is what I meant by that; the gauger's list corresponds with the invoice of the Crown Distillery Company, that is to say, the Crown Distillery Company invoices show the amount of whisky sold to us, the total gallons sold to us.

Q. In the barrels?

A. Yes, and that corresponds with the gauger's list.

Q. And this quantity that you thought you were selling, when you sold a barrel of whisky to anybody up there? A. Yes, sir.

Q. Now, Mr. O'Reilly testified for the claimant that you sold him some whisky up there?

A. Yes, sir.

Q. And he also testified as to the outage on that whisky? A. Yes, sir.

Q. I will ask you if he made any complaint about the outage to you, and what you did about it?

A. Well, he came to me, after I sold him the whisky; I sold him the whisky and it averaged about 35 gallons to the barrel. I sold according to that invoice, and the invoice—that is, I sold according to the gauger's list and the invoice of the Crown Distillery Company; and the barrel goods averaged about 35 gallons to the barrel, and he bought sev-

(Testimony of W. A. Malloy.)

eral barrels and finally he said that he noticed they were running short or something—

Mr. POWELL.—I object to this as incompetent and hearsay.

A. He measured them and the last three I think he got and he said they were eight or ten gallons short each and that put that down to about 25 or 27 gallons, where they should be 35. I told them I went according to this invoice and this gauger's list, and I says that cannot be. Well, he says, you have got to make good here or I will send an attorney after you, and mentioned the attorney's name, Mr. Kanaga, an attorney here, and I told him I would see him later and I went back to the warehouse and had Peterson measure the barrel goods with a rule; in fact, we run out one barrel and it run about 25 or 26 gallons—I don't remember; it was either one or the other—and finally we concluded that Riley was right about the matter, so I went back and saw him and I had to settle with him. I think I gave him ninety-five or one hundred and five dollars; it is either one or the other, something in that neighborhood, and the thing was dropped.

Q. Did anybody else make any claim that they were short?

(Testimony of W. A. Malloy.)

A. Yes, there were several others there that were short; I had to give two barrels of liquor and some money in different cases.

Q. Do you remember to whom?

A. There was a fellow named Johnson and another fellow named Peterson, and a fellow named Ackley; they were all in the business there.

Q. Do you remember Urquhart?

A. Yes, I gave him a barrel or two; I don't remember. Riley went and told them about the shortage and he made complaint to several others in the same way.

Q. Now, returning to the testimony of Judge Wood. Judge Wood testified that it was very distinctly a part of our arrangement, meaning the arrangement he claims to have had with you, that the damage that was to be ascertained was to be for any and all purposes for which it might be necessary out here, meaning in the States or at Seattle. State whether such an arrangement as that was made with you.

A. Never heard of it. No, sir, none whatever.

Q. Judge Wood states that the captain advised him that the loss would be a general average loss; and Gollin also stated the same thing, and that he feels sure that he mentioned it to you as a general average loss. State whether or not that is true.

(Testimony of W. A. Malloy.)

A. Never heard of it. No, sir.

Q. Now is there any other matter, Mr. Malloy? You heard the testimony of Judge Wood, and if there is any matter I have overlooked that you desire to testify to you may do so.

A. I believe that covers it all.

Q. After Judge Wood and you had the conversation in which he asked you to take the goods up to the Standard Theater Company's warehouse, and state that neither one, neither party would waive anything by that, what did you do with reference to taking advice upon the subject, legal advice?

A. I talked to some of my partners and some of the men at work with me, talked it over and when I was told that we would not lose any rights—

Q. What about legal advice, did you see a lawyer?

A. Yes, sir, we went to look up a lawyer, Mr. L'Abbe I believe was going to Mr. Sullivan.

Q. Charley Sullivan?

A. Charley Sullivan, but we could not find him and your office was on the same floor and we employed you.

Q. And did you get legal advice as to your rights about taking these goods when they were offered up there by Judge Wood?

A. I don't remember about that.

Q. To refresh your recollection, Mr. Malloy, I will ask you if I did not state to you that it was your

(Testimony of W. A. Malloy.)

duty to take your goods and preserve them and save all the damage possible?

Mr. POWELL.—I object as incompetent and irrelevant.

A. Yes, I think you did; it is quite a long while ago; I think you did.

Q. Pursuant to that legal advice, state what you did with reference to taking your goods up to the Standard Theater Company's warehouse.

A. Well, after I went to my attorney, I told Wood the arrangement would be satisfactory, that we decided to take the goods up there, and he said he would be very glad to have us take them away, and we started in and hauled them up to the warehouse and it took us probably a week.

Q. Was there anything said by Judge Wood to you at that time or at any other time, about his retaining custody of these goods, or the right to take them back at any time?

A. None whatever; no, sir.

Q. The goods were delivered to you, as I understand it, they were delivered unconditionally, except that neither he nor you waived any rights by their delivery? A. Yes, sir.

(Testimony of W. A. Malloy.)

Cross-examination.

Q. (Mr. POWELL.) Referring to this document that is introduced here, purporting to be a copy of the gauger's certificate. Now, what makes you think that that is a copy, Mr. Malloy?

A. Well, as I said, to the best of my recollection and looking at the invoice of the Crown Distillery Company, I am satisfied that is a copy.

Q. Now, that gauger's certificate that you had at Nome, was a long table of figures, was it not?

A. On the front and on this one here (showing).

Q. You cannot remember these figures, can you?

A. Well, in a way; these figures correspond with the total gallons of the Crown Distillery Company's invoice. In a way I might remember them.

Q. (Mr. BRINKER.) These invoices are in evidence here as exhibits, are they not?

A. Yes, sir. The total gallons is on the invoices, the goods that were sold us.

Q. (Mr. POWELL.) I understood you to say that you took Mr. Gollin as representing the insurance companies up there?

A. Mr. Gollin said he represented the insurance companies, yes, sir.

Q. And you supposed the examination being made of your goods was being made by him as a representative of the insurance companies?

(Testimony of W. A. Malloy.)

A. Yes, sir.

Q. What capacity was Judge Wood acting in, did he represent the vessel? He was one of the charterers, was he?

A. I suppose he was, yes.

Q. You did not understand that he represented the insurance companies, did you?

A. No, I did not understand he represented the insurance companies.

Q. Why did you suppose he was interesting himself to all in this examination that was being made of your loss?

A. Well, that I could not say; he said that there was an adjuster there; he came to us and said there was an adjuster there to represent the insurance companies.

Q. If it was an affair between you and the insurance companies why did you suppose he was interesting himself in your matter?

A. That I could not say.

(Testimony of witness closed.)

GEORGE A. L'ABBE, a witness recalled on behalf of the libelant, testified as follows:

Q. (Mr. BRINKER.) Mr. L'Abbe, were you present at a conversation between Mr. W. D. Wood —you know him? A. Yes.

(Testimony of George A. L'Abbe.)

Q. A conversation between Mr. Wood, A. G. Lane, T. J. Considine and yourself, on the beach, near the warehouse of Mr. Wood's transportation company, in Nome, concerning the delivery of the cargo of the Standard Theater Company, to that company, at Nome? A. Yes, sir.

Q. I will ask you to state what that conversation was as you recollect it, and how it came about.

A. We were there. Mr. Lane, Mr. Considine and I were looking at the goods that were strung along from the beach to the warehouse mostly; some were in the warehouse, but the warehouse was so crowded there was no place to look at them. I think the most of the barrels were on each side of that little track coming from the beach to the warehouse, and Mr. Considine spoke to Judge Wood and told him that any of the goods that were all right, that were not damaged, he wanted to take them up to the Standard Theater Company's warehouse and start in business as quick as we could. And Judge Wood said that was all right. I also spoke to Judge Wood at that time about the insurance. I paid Judge Wood the money when we left here to insure our stuff, and I had no policy and I looked to him for the policies on these goods; he was the man that had the goods insured for us. I paid him $450, I think it was, and did not have either of the policies, and never got them

(Testimony of George A. L'Abbe.)

until we returned here a long while after we came back.

Q. And what was said about the insurance at that time?

A. Wood said we would get our policies all right and the insurance would be adjusted; he said we were insured at Lloyd's or such a firm, and that was why we did not get our policies.

Q. Did he say anything about Mr. Gollin making an examination or survey?

A. No; never met Gollin that I know of; I don't think I ever met him. If I did I don't remember.

Q. At the time Mr. Wood and you and Mr. Considine and Lane were talking there, and Mr. Wood said you could take the goods up to the Standard Theater Company's warehouse, was anything said by Wood as to whether these goods would be delivered to the Standard Theater Company conditionally or to be returned to him under any circumstances?

A. No, sir; we took the goods there to do business with, to start in as soon as we could.

Q. Was there anything said at that time or any other time when you were present, by Wood, about these goods being returned to him after examination made by Gollin, if it was not satisfactory?

A. No, sir. I don't know anything about Gollin; I never heard of him.

(Testimony of George A. L'Abbe.)

Q. Did you ever meet Gollin or be present when he was making an examination of the goods?

A. I don't think I did. If I did I don't remember it.

Q. Was there any place in the warehouse of the transportation company where these goods could have been examined?

A. No, the warehouse was piled up to the roof pretty near; only a little passageway that you could get through, a little track through there.

Q. Did Judge Wood say anything to you at any time or did Mr. Gollin, or anyone else representing the steamer "Santa Ana" about a general average adjustment, or general average bond or anything of that kind?

A. Never was anything mentioned about a bond or general average. I did not know what it meant for a year after I returned. The only thing I was looking after was the insurance. I had paid money to Judge Wood or Mr. Hawley down here, and did not receive the policies; and the only thing I was looking after was the $20,000 insurance we had, or some such amount.

Q. Do you say the words "general average" were never mentioned to you, and you never heard them?

A. No, sir.

(Testimony of George A. L'Abbe.)

Q. Was there any demand made of you or in your presence or anybody connected with the Standard Theater Company, by Judge Wood, for any kind of agreement or security to answer in general average?

A. I was president and treasurer of the company, and it never was asked of me. I held these two positions, president and treasurer, and he never asked me for any bonds or any deposits of any description.

Q. Was it ever asked of you by Judge Wood or anybody connected with Judge Wood, that you make a deposit on account of the Standard Theater Company of ten per cent, or any other amount?

A. No, sir.

Q. Was it ever stated to you, or did you agree in any way that the average amount of loss sustained by the Standard Theater Company was ten per cent?

A. No, sir; I figured that our goods were burned outright, like bar fixtures and that stuff was all charred. I did not know what loss we had sustained.

Q. You made no agreement as to any amount of loss? A. No, sir, not with anyone.

Cross-examination.

Q. (Mr. POWELL.) You people, that is the Standard Theater Company, were particularly desirous of getting hold of your goods as soon as possible,

(Testimony of George A. L'Abbe.)

so as to get to doing business with them or make whatever disposition you desired? A. Yes.

Q. And it was to enable you to do that that you understood to be the purpose of that examination, whatever examination was made, or did you have anything to do with that?

A. I had nothing to do with that, Mr. Powell.

(Testimony of witness closed.)

C. R. MESSERSMITH, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. BRINKER.) Where do you live?

A. Alki Point.

Q. What is your business?

A. My occupation is bookkeeper and rectifier.

Q. Rectifying liquors? A. Yes, sir.

Q. How long have you been in the rectifying of liquor business? A. About 12 years.

Q. Are you acquainted with the custom of placing liquors in bond and taking it out, etc.?

A. Yes, sir.

Q. Now, what is the practice of putting liquor in bond and taking it out and paying the taxes on it?

A. What is the practice?

Q. Yes, sir.

A. Well, when it is distilled it is entered into a bonded warehouse, placed in a bonded warehouse; at the time of its entrance there is a stamp placed

(Testimony of C. R. Messersmith.)

on there called a warehouse stamp. And it remains there for a certain number of years, and when it is withdrawn to be shipped away, sold, it is then taxed —the taxes paid. And on its entrance it is gauged— what is called an entrance gauge; then when it is withdrawn it is given what is called a re-gauge. Then is when the tax-paid stamp is placed on it. That is when the government charges the tax, so much a proof-gallon.

Q. And when that second stamp is put on, is that what makes double stamp goods?

A. Yes, sir.

Q. What does that show?

A. That shows the actual contents of the barrel at that time.

Q. That is, when it is withdrawn from the bonded warehouse that is when the second stamp is put on?

A. Yes, sir.

Q. Now, from your experience and observation, Mr. Messersmith, what is the natural outage in barrel goods, while it is in bond?

A. Well, it loses an outage by shrinking, as it shrinks it raises the proof, and in a barrel there is an outage of ten or twelve gallons, that is wine gallons; and while it loses in shrinkage it raises in proof and therefore it is about a stand-off with the entrance, at the time of the entrance, and there is hardly any

(Testimony of C. R. Messersmith.)

value lost on the goods at all. It is usually entered 100 proof, and when it is withdrawn it runs up to, say in six years, to 106 or 110; that depends on the heat in the warehouse.

Q. Now, when the goods are withdrawn and the second stamp is put on and the taxes paid, you say it is re-gauged, and that re-gauging shows the actual contents of the barrel? A. Of the barrel, yes, sir.

Q. Now, if goods were purchased say in April, 1900, in Louisville, Kentucky, and shipped to Seattle, and then shipped from Seattle by sea to Nome, what would be the shrinkage or loss per barrel on these goods during that time?

A. Well, probably it would take about a month to make that shipment, including the transfer and delay. Why, it would not from my experience be any more than a half a gallon.

Q. To the barrel? A. To the barrel.

Q. I show you this exhibit, which is the gauger's certificate introduced in evidence to-day, and ask you to look at that and state from your experience what that is, and what it purports to show. (Witness examines paper.) That is the gauger's certificate from these goods at the time they were shipped.

A. That shows about the usual usage, I think; I noticed on some it appears a little more than the usual amount. It may be on account of the ware-

(Testimony of C. R. Messersmith.)

house, that it was heated that much more. In any case, I do not think the outage should be more than ten gallons, and there I see it shows 12. It may be on account of the difference in the heat of the warehouse.

Q. This shows the outage at the time of the regauging and the second stamp was put on?

A. Yes.

Q. Now, Mr. Messersmith, suppose that these goods were stored in the bottom of the hold of the ship and shipped from Seattle to Nome, in May, 1900, within a month after they were withdrawn from bond, and while the ship was at sea a fire broke out in the hold, and they turned water into the hold, and then turned in live steam at from 200 to 240 pounds pressure for fourteen hours, state whether in your opinion that would cause any loss of the contents of the barrels.

A. Well, it would to some extent, but not to a very great extent, because if the heat was too intense, the barrels would not hold together.

Q. To what extent would it cause loss of the contents of the barrel subject to that pressure of steam and heat for 14 hours?

A. Well, in my opinion it would not be—the evaporation would not be much more than—it would not be more than two gallons to the barrel. It is my

(Testimony of C. R. Messersmith.)

experience that the barrel will not stand the heat, that is for that space of time. Of course, if it was gradual and strong for a long time, it probably would.

Q. Suppose the barrels showed around the bung and down the sides of the barrels, evidence of the contents having run out, and that when they were disposed of, it was ascertained that some of them were from nine to ten gallons short, what would you say caused that shortage?

A. From leakage, I should say, unless the barrels were opened and the contents taken out.

Q. Would that leakage be caused by that steam pressure? A. It might possibly be, yes, sir.

Q. In the absence of any evidence of any other cause for that leakage, what would you say caused it?

A. Well, as I stated before, unless the bunghole was opened and some of the contents taken out that way, it may be that the intense heat would spring the barrels in such a way as to cause some leakage, but if it did the barrels would fall to pieces. I only had one experience of that kind; it was on the steamship "Queen."

Q. In that case the fire got right in among the barrels, didn't it?

A. Well, it did not get quite to the barrels.

(Testimony of C. R. Messersmith.)

Cross-examination.

Q. (Mr. POWELL.) Mr. Messersmith, you have been asked what would happen in case of live steam turned into the hold of the vessel under 200 to 240 pounds pressure, for 14 hours. What effect, if any, would that have—it would depend on the hold of the vessel and size of the jet of steam that was turned in?

A. Yes, sir.

Q. You may turn in a small jet or a big jet and the vessel's hold may be large or small. Small jet of steam turned in for that length of time in the main hold of a vessel would not have any effect to amount to anything at all, would it?

A. Well, I should think it would if everything was closed up where no air could get in, with all the cargo in there, the space would be very small.

Q. You are assuming—that is what I am trying to get at, the effect the steam would have would depend in a large measure on how much was turned in, would it not? A. Yes.

Q. Now, supposing there was fire in the hold of the vessel, it would be the most likely to spring the barrels, dry heat from the fire than the damp heat from the steam?

A. Well, it would have to take both to spring the barrels; that heat would have to come first and then the steam and cause them to swell up.

(Testimony of C. R. Messersmith.)

Q. The steam has more tendency to swell up the wood than the fire does it not?

A. Yes, it has.

Q. Now, the dry heat from the fire would be more apt to cause the barrels to open? A. To shrink.

Q. To shrink and thereby open than the steam would, would it not?

A. Well, that would be hard for me to say, never having had an experience in that line.

Q. Well, you have had experience with whisky barrels and in that you know that you had a hot fire and that caused the barrels to shrink and open?

A. Yes, sir.

Q. And that the damp heat from steam will cause it to swell? A. Yes, sir.

(Testimony of witness closed.)

A. G. LANE, recalled on behalf of the libelant, testified as follows:

Q. (Mr. BRINKER.) You know W. D. Wood?

A. I do.

Q. Were you present at Nome at the time of a conversation between Wood, Mr. T. J. Considine, Mr. L'Abbe and yourself concerning what should be done with the cargo of the Standard Theater Company which went to Nome on the "Santa Ana"?

A. I was.

(Testimony of A. G. Lane.)

Q. Now, where was that conversation had?

A. It was had in the S. Y. T. Co.'s warehouse on the beach at Nome.

Q. Who was present, the persons I have mentioned?

A. Mayor Wood, Tom Considine, George L'Abbe, myself and a man Wood had there checking freight, his head freight checker—warehouse-man, I guess he was.

Q. What was said in that conversation, Mr. Lane?

A. Well, we went down there, Considine, L'Abbe and I; we saw the freight coming in off the "Santa Ana," and we went down there to see about getting it out. We had the warehouse or temporary theater building up and we were waiting for the goods, to start the business going, and we went down there to see if there was any of it left, or any of it that we could get to start with, and we met Wood there at the warehouse. They did not have a warehouse at that time. They had a little strip about 12 feet wide what would have been a large warehouse eventually, but there was a fellow had a claim right in the middle of it, with a canvas house, partly wood and partly canvas, and a high fence around it, and they had about one course of corrugated iron around it, possibly two, but my impression now is there

(Testimony of A. G. Lane.)

was only one around the room, and they could not get this fellow ousted from the claim, and he was there with a Winchester rifle standing there while we were talking, and I guess he heard part of the conversation. They had goods piled up in this little room and outside of that claim and on the beach; that was the only warehouse the S. Y. T. Co. had at that time. Wood was there and the goods were coming off the ship and they were piled up and stacked up, and there was no attempt about order. Part of the goods were on the beach and they were not out of the way of high water in case of a storm. Considine was mad, was very angry about it and asked Wood if there was any of that damned stuff left after the fire or steam had not soaked or small-pox got into, or if there was anything that they could get to start up business with; and L'Abbe was sort of inclined to be a little more diplomatic and he suggested to Wood that if there was any of the goods fit to use that he be allowed to take them, and Mr. Wood said that the goods would have to be opened, all the packages would have to be opened, so that the insurance people could examine them and adjust the loss, and he says there is no place here to do it; we have no protection from thieves, we have no protection from the water, and he says you folks have got a good warehouse where it can be segre-

(Testimony of A. G. Lane.)

gated and the packages opened and examined, and he says you can take it just as it comes off the ship. Mr. L'Abbe said if they did not waive any of their rights in the matter and was not assuming any responsibility they would do that. Wood said it would be understood that neither party would waive any rights or assume any liability or anything else, simply take the goods up where they would be secure, and open them and have them examined and the loss adjusted for fire. L'Abbe said he would consult his attorney, and if they could do that without assuming any responsibility or without accepting the goods in the condition they were in, they would do that. So I don't know what he done; he went away and two or three hours later L'Abbe came back and told me to get all the teams I could and to get the goods up to the warehouse as fast as possible.

Q. Was anything said at that time by Judge Wood or anybody else about general average loss or general average adjustment?

A. I don't believe there was a man in Nome that ever heard of general average. Never was anything mentioned of that description, the only mention was of the fire insurance policy.

Q. Now, you say that the goods were in this warehouse that they had there, such as it was?

(Testimony of A. G. Lane.)

A. They were not in the warehouse; that warehouse was full and they were piled up in heaps on the beach just as they came off the scow.

Q. Did you notice a little railroad track up from the beach? A. Yes, sir.

Q. How were the goods piled with reference to that railroad track?

A. They were piled along on the left-hand side.

Q. They were not in the warehouse at all?

A. They were not in the warehouse at all. The warehouse was full; that is such warehouse as they had; they had only a strip about 12 feet wide.

Q. Well, now, were you present at the warehouse at any time while Gollin was there making a schedule?

A. I was there all the time, opening the packages and handling the goods.

Q. What kind of an examination did he make there?

A. Well, he came there, I think on three different occasions.

Mr. POWELL.—I object as incompetent and not proper rebuttal.

A. He came there on three different occasions, three different days, quite an interval between each day, and he examined such goods as were burned,

(Testimony of A. G. Lane.)

showed evidence of coming in contact with the fire, and nothing else.

Q. What examination did he make of any goods that showed evidence of damage by steam or water?

A. He would not touch them; he would not have anything to do with them; he was representing the fire underwriters, I think he called them—the marine fire underwriters, at San Francisco.

Q. What agreement, if any, did he and Malloy make as to the amount of damage to these goods, or any part of them?

A. They never made any agreement; they quarreled all the time Gollin was in the building; they quarreled over every item they examined—that is, they did not quarrel, but they did not agree on it.

Q. Did you hear any agreement between them of any item of damage, assessed or stated by Gollin?

A. I think there was one or two items; there was a case of groceries and kitchen utensils that was burned, that was a total loss, and they agreed on that, because that was a total loss; the groceries and canned stuff was all burned up and the canned stuff all opened and that was the only item I can recollect that they did agree on. There was a couple of barrels of stuff that was gone entirely, that had been thrown overboard; I think they agreed they were a total loss; they were burned so they were thrown overboard from the ship.

(Testimony of A. G. Lane.)

Q. That was the only agreement made?

A. That is the only one I can recollect they actually agreed on.

Q. State whether or not Mr. Malloy agreed at any time with an assessment of ten per cent damage on these goods, the entire amount?

A. No, indeed, he did not. There was no sane man could look at these goods and agree on a ten per cent loss on them—he might agree to a ninety per cent loss. He would not have to examine the goods at all to reach a conclusion away above a ten per cent loss.

(No cross-examination.)

(Testimony of witness closed.)

At this time an adjournment was taken, subject to agreement of proctors.

Seattle, Wn., August 21, 1905.

Continuation of proceedings pursuant to agreement, at 2 P. M.

Present: Mr. BRINKER, for the Libelant.
Mr. POWELL, for the Claimant.

Mr. RILEY, recalled on the stand by the libelant for further

Cross-examination.

Q. (Mr. BRINKER.) You were examined before and you testified that you had purchased either

(Testimony of George O'Riley.)

fifteen or seventeen barrels of whisky from Malloy, at Nome?

A. Yes, sir.

Q. And that these barrels were short in their contents?

A. They were short of the bill that he gave me.

Q. They were short of the bill that he gave you?

A. Yes.

Q. Now, Mr. Powell asked you whether that was what was known as the natural outage, the ordinary evaporation, and I have forgotten what your answer was as to that. What I want to ask you is, whether there was more than you understand would be the natural outage in barrels? A. Yes, sir.

Q. I want to ask you whether these barrels were short a greater amount than the natural outage would be.

A. Well, I don't remember as to that. The only thing I know, what I am positive of, is the barrels seemed to be light. After I had used three of them, why, in rolling up the fourth, I helped to roll it up myself, I said, "My God, there is not the amount of whisky in these barrels that he has charged me for." So I sent for him and I says, "We will just draw this off and see," and we drew it off. I don't remember exactly the shortage, but anywhere between five and seven gallons less than what he had me charged with.

(Testimony of George O'Riley.)

Q. And when you made complaint about that, did he make any settlement with you for the shortage?

A. Well, he tried to make me believe that if there was anything out of them barrels, it was taken out after it got to my house.

Q. Well, subsequently, did he ever fix it up with you?

A. Why, I went to him and asked him to do it and he told me that he would not make anything right. I says, "What do you mean by that—are you going to stand pat?" And he says, "Yes, that is exactly what I mean." I says, "I will have to get my attorney"; so I went over to Kanaga's, my attorney.

Q. Kanaga was up there at that time?

A. Yes. And he went down and seen Malloy and Malloy came up and paid the bill.

Q. How much did he pay you for that shortage?

A. I don't remember. I know I told him, the attorney, I would give half if he would collect it. I think it was in the neighborhood of a hundred dollars. I did not get what I ought to have gotten. But I bought more whisky afterwards of Malloy, the same goods.

Q. That that you bought afterwards, how was that as to quantity?

(Testimony of George O'Riley.)

A. Well, that I believe we measured every barrel and paid for the number of gallons that was in it.

Q. Now, do you remember in measuring that whether it was short of what it ought to have been?

A. No, I don't remember that.

Q. How many barrels did you subsequently buy from him?

A. I don't recollect; it was between 12 and 17 somewhere.

Q. Altogether? A. Yes, sir.

Redirect Examination.

Q. (Mr. POWELL.) How much did you pay for the whisky per gallon?

A. I do not remember. I think it was anywhere between $2.40 and $2.65. I think that is what I said before.

Mr. BRINKER.—My recollection is that he said he paid about $2.35.

A. That might have been. I said anywhere between $2.25 and $2.40. I don't remember. I did not pay enough attention to it to remember accurately.

Q. Do you remember how many gallons there were in this barrel you drew off?

A. No. I don't remember that.

(Testimony of witness closed.)

T. J. CONSIDINE, recalled in rebuttal, testified as follows:

Q. (Mr. BRINKER.) Mr. Considine, you have testified in this case already, that you were at Nome at the time the "Santa Ana" landed there?

A. Yes.

Q. On that voyage of May, 1900?

A. Yes. June, 1900.

Q. She landed in June?

A. She left here May 26th and landed in June.

Q. Do you know a man by the name of Gollin, W. W. Gollin, an insurance surveyor?

A. Never met him in my life.

Q. Ever see him?

A. I don't know him; did not see him.

Q. Mr. Gollin's deposition has been taken by the claimant in this case, and in that deposition he testifies that you introduced him to Malloy.

A. I never met the gentleman in my life.

Q. Then you did not introduce him to Malloy?

A. No, sir. I did not know him.

Q. Now, Mr. Considine, Mr. W. W. Wood was asked about a conversation between himself, George A. L'Abbe and yourself and A. G. Lane, as follows: "Q. Whether Considine did not say to him (Wood), 'Now, if there is anything in this cargo that is worth anything, that we can do anything with, let us get

(Testimony of T. J. Considine.)

it out and take care of it,' or words to that effect, and did not you in that connection say, 'yes, I want you to take your goods and take them away from here because we haven't room for them,' or words to that effect; and did not you also say in the same conversation I speak of to Lane and Considine and L'Abbe, that if you [meaning the Standard Theater Company] will take your goods away from here and move them up where you can straighten them out and spread them out and examine them in your warehouse, neither you [meaning the Standard Theater Company] or us [meaning the S. Y. T. Company] or the ship, will waive any rights in the matter," or words to that effect. Now, his answer was that he did not remember any such conversation with those persons named, and including yourself. Now, I want to ask you to state whether or not that conversation was had in substance or effect.

A. Well, to the best of my recollection we were down there and they were unloading the "Santa Ana," and he had a warehouse there himself pretty well filled up and had a lot of stuff, ship's cargo strung along—there was a little railroad running up there and the cargo looked awful tough, looked awful bad. I remember something, I don't just remember the exact words, but I said to Wood something of that order. I says, "For God's sake, if there is anything here that is any good to us, let us get it up and get

(Testimony of T. J. Considine.)

to doing something." And Wood says, "Yes, I wish you would, it would help us out; we are crowded here anyway." Wood says, "We will not waive any rights, neither one of us in this matter, when you take it up to your warehouse." L'Abbe says, "Wait. I will go and see an attorney." I don't remember whether you were attorney then or not, Judge.

Q. Yes, he came to see me.

A. But he went to see an attorney, L'Abbe did, and shortly after that I think they did take some stuff to the warehouse; that is my best impression, the best of my recollection.

Q. Now, did Mr. Wood at any time say anything to you about a general average contribution?

A. No, sir; it was all on the fire insurance. There was no general average or ten per cent or anything mentioned about it.

Q. Was there any demand made of you or in your presence that the Standard Theater Company should deposit ten per cent or anything of that kind?

A. No, sir.

Q. Was there anything said to you about an agreement of any amount of damages that the cargo of the Standard Theater Company had suffered?

A. No, they could not tell.

Q. Were you present at the time Mr. Wood employed Mr. Gollin to make a survey of the cargo?

(Testimony of T. J. Considine.)

A. I never met Mr. Gollin. I don't know him.

Q. You were an officer of the Standard Theater Company at the time? A. Yes.

Q. And one of the directors were you not, a trustee? A. Yes.

Q. Was there anything said to you, or in your presence, about any general average contribution?

A. I never heard about general average or any insurance outside of our insurance policy, which I thought was fire insurance until we got back here. I believe you told me first about their bringing up general average.

Q. Your idea was to recover against the insurance company as for a fire loss? A. Yes, sir.

Q. You did not have any idea that anybody else was liable for anything? A. No.

Mr. POWELL.—No cross-examination.

At this time further hearing adjourned to a date to be agreed upon by proctors for the parties.

United States of America,
District of Washington,
Northern Division,—ss.

I, A. C. Bowman, United States Commissioner for the District of Washington, do hereby certify that:

The annexed and foregoing transcript of testimony and proceedings, from page 1 to page 572, inclusive

was taken at my direction at the times and in the manner therein specified.

Each of the witnesses therein named, before examination, was duly sworn to testify the truth, the whole truth and nothing but the truth.

The signature of each of said witnesses to his testimony was duly waived by the parties, the testimony of said several witnesses to be received with the same force and effect as if signed by said witnesses.

The exhibits offered by the libelant, and filed and marked by me Libelant's Exhibits Nos. 1 to 127 inclusive, and the exhibits offered by the claimant, and filed and marked by me as Claimant's Exhibit "A," are returned herewith.

I further certify that I am not proctor nor of counsel for either party to said suit, nor interested in the result thereof.

In witness whereof I have hereunto set my hand and affixed my official seal, this 23d day of September, 1905.

A. C. BOWMAN,
United States Commissioner.

[Endorsed]: Testimony. Filed in the U. S. District Court, Western Dist. of Washington, Sept. 28, 1905. R. M. Hopkins, Clerk. A. N. Moore, Deputy.

United States District Court, Western District of Washington, Northern Division.

No. 2438.

THE STANDARD THEATER COMPANY,

Libelant,

vs.

The American Steamship "SANTA ANA."

Memorandum Decision on the Merits.

Filed April 18, 1906.

From the testimony introduced and the briefs of counsel it appears that this case has been tried upon a theory or understanding that the Court, by its decision upon exceptions to the answer, had set aside the general average adjustment made at San Francisco, and had undertaken to make an original general adjustment. The decision, however, only went to the extent of holding that in the absence of an agreement between the parties to be bound by it, the adjustment was not conclusive, nor invulnerable to any attack on accounts of errors or unfairness. I consider that an adjustment made by professional adjusters, at the request of and with the acquiescence of the interested parties is presumptive, though not conclusive, evidence of the rights and obligations of a carrier and shipper, arising under the laws and rules of general average.

The evidence proves that the adjustment was made, as pleaded in the amended libel, at the request of the owners of the ship, and that it was fairly and honestly made by a competent adjuster; and upon consideration of all the evidence and the pleadings I am convinced that the adjustment as made is approximately accurate and just, and it certainly is not unfair to the owner of the ship.

All errors of the adjuster in computation of interest and expenses, are more than counterbalanced by his failure to take into account the $6,073.47 paid for freight and wharfage by the libelant. The adjuster found the total contributory value of freight money to be $3,427.72, from which he allowed a deduction of $1500.00 for wages, and port charges. Therefore it is apparent that the freight money paid by libelant was overlooked in estimating the freight assessed for contribution. It was also overlooked in estimating the value of the libelant's goods in estimating the amount of damage to be compensated for in general average. The adjuster placed the total value of the shipment at $36,192.00, whereas the uncontradicted evidence proves that the cost price of the goods at Seattle was $32,769.00, and with the amount of freight and wharfage paid in cash, made the total amount invested at least $2.630.00 more than the adjuster's valuation, and at Nome prices the goods were worth more than cost and freight, and would have been readily salable at a large profit when the ship arrived

there if they had been delivered in good condition. Therefore by estimating the damage on the basis of the Nome values, the amount would exceed the adjuster's award, including interest, and any other items erroneously taken into the account.

The libelant argues for a larger award than obtained by the adjustment, but it does not by its pleadings repudiate the adjustment, and should be content to have a decree for the amount sued for, with interest.

With respect to the survey and appraisement of damages made at Nome, very little need be said. Mr. Gollin's certificate proves conclusively that his examination of the libelant's goods was not complete, and that his appraisement was partial and unfair, and his testimony is rambling and baffling. I consider that it proves nothing. An attempt is made to bind the libelant by an alleged agreement to accept the appraisement of damage made by Mr. Gollin. That no such agreement was made is proved by convincing evidence. Judge Wood appears to have taken it for granted that Gollin had appraised the damages to the satisfaction of the libelant's representatives, but he admits that he has no personal knowledge of an agreement, and that if the agreement was made it was not reported to him either by Gollin or by the libelant's representatives. He was at Nome, representing the charterer of the vessel, and is the person

to whom an adjustment should have been reported, if there was any, but it appears that he received only Gollin's certificate, which upon its face appears to be incomplete, and to have been made not for the purpose of a general average adjustment but for the information of the San Francisco Board of Underwriters. Neither the master nor the charterers of the vessel had any right to place dependence upon Gollin's certificate because its incompleteness should have challenged their attention. When I refer to incompleteness, I refer especially to the glaring fact, that all of the libelant's consignment was not examined or appraised, either as to damages, or value for the purpose of contribution in general average.

I direct that a decree be entered in favor of the libelant for $12,907.00, with legal interest thereon from the date of the commencement of this suit, and for costs.

C. H. HANFORD,
Judge.

[Endorsed]: Memorandum Decision on the Merits. Filed April 18, 1906. R. M. Hopkins, Clerk. By A. N. Moore, Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 2438.

THE STANDARD THEATER COMPANY,

Libelant,

vs.

The American Steamship "SANTA ANA," Her Tackle, Apparel, Engines, Boilers, Machinery and Furniture,

Respondent.

Final Decree.

This cause having been heard on the pleadings and proofs and upon written briefs and arguments of the advocates of the respective parties, and the same having been carefully considered, and the Court being now fully advised in the premises, finds the issues for the libelant, and it is now considered, ordered, adjudged and decreed that the libelant have and recover the damages by it sustained by reason of the matters alleged in the libel in the sum of fifteen thousand three hundred and seven dollars and sixty-nine cents, with costs to be taxed herein, and that this decree bear interest at the rate of six per cent per annum until paid.

And it is further ordered, adjudged and decreed that the said American steamship "Santa Ana," her

tackle, apparel, engines, boilers, machinery and furniture be condemned therefor.

And it is further ordered, adjudged and decreed that in pursuance of section 941 of the Revised Statutes of the United States and the amendment thereof by the Act of Congress approved on March 3, 1899, a summary judgment be and the same is hereby rendered and entered in favor of libelant and against The Charles Nelson Company, principal, and E. E. Caine and J. F. Trowbridge, sureties, on their bond given on the discharge of the property arrested, for the sum of twenty-six thousand two hundred and fifty dollars ($26,250.00), the amount of their said bond; and against the said Charles Nelson Company, principal, and E. E. Caine, surety, upon their stipulation for costs herein, that said stipulators cause the engagements of their stipulation to be performed by the payment of the costs herein, to be taxed.

And it is further ordered that unless an appeal be taken from this decree within the time limited by law and prescribed by the Rules and practice of this court, or unless the amount of this decree together with all costs be paid within ten days from the time this decree is entered, the libelant have execution in accordance herewith to enforce satisfaction hereof.

Done in open court this 1st day of May, 1906.

C. H. HANFORD,

Judge.

Notice of the within decree by delivery of a copy to the undersigned is hereby acknowledged this 30th day of April, 1906.

PETERS & POWELL,
Proctors for Claimant.

[Endorsed]: Final Decree. Filed in the U. S. District Court, Western Dist. of Washington, May 1, 1906. R. M. Hopkins, Clerk. A. N. Moore, Deputy.

In the United States District Court, Western District of Washington, Northern Division.

No. 2438.

THE STANDARD THEATER COMPANY,
Libelant,

vs.

American Steamship "SANTA ANA," Her Tackle, Apparel, etc.,
Respondent,

THE CHARLES NELSON COMPANY,
Claimant.

Notice of Appeal.

Take notice that the claimant above named hereby appeals to the United States Circuit Court of Appeals

for the Ninth Circuit from the final decree entered herein on the 1st day of May, A. D. 1906.

PETERS & POWELL,
H. S. GRIGGS,
Proctors for Claimant and Appellant.

To Wm. H. Brinker,
Proctor for Libelant and Appellant.

R. M. Hopkins, Esq.,
Clerk of the U. S. District Court of the United States for the Western District of Washington, Northern Division.

Due service of the foregoing notice and the receipt of a true copy thereof is hereby acknowledged by each of us severally.

Dated at Seattle, Washington, this 2d day of July, 1906.

WM. H. BRINKER,
Proctor for Libelant.

[Endorsed]: Notice of Appeal. Filed in the U. S. District Court, Western Dist. of Washington. July 2, 1906. R. M. Hopkins, Clerk. A. N. Moore, Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

THE STANDARD THEATER COMPANY,
Libelant,

vs.

The American Steamship "SANTA ANA," Her Tackle, Apparel, Furniture, Boilers and Machinery,
Respondent.

THE CHARLES NELSON COMPANY,
Claimant.

Assignment of Errors.

Now comes the claimant and appellant, the Charles Nelson Company, and says:

That in the record and proceedings in this cause, and in the decree rendered herein, there is manifest error in the following, among other particulars:

First.—That the Court erred in sustaining the libelant's exception to all that part of Paragraph 7 of the claimant's original answer, except so much thereof as admits the allegations contained in paragraph 7 of libel.

Second.—In that the Court erred in sustaining the libelant's exception to all that part of claimant's original answer which is as follows:

That it was provided by paragraph No. 12 of the bill of lading issued to the Standard Theater Company by and on behalf of the said vessel for the shipment of libelant's goods to Nome, as aforesaid, among other things, as follows: "In the event that the said Seattle-Yukon Transportation Company shall become liable for any injury, damage or loss to said property, it shall receive the benefit of any insurance thereon in favor of the shipper, owner or consignee." Claimant alleges that the said clause in the said bill of lading was made by the said Seattle-Yukon Transportation Company as agent for the claimant and for the benefit of the claimant, and the full benefit thereof has been assigned to the claimant by the said Seattle-Yukon Transportation Company, and claimant is informed and believes that the said Standard Theater Company carried other insurance upon its said goods in domestic and foreign corporations, the particulars of which are unknown to claimant, but claimant is informed and believes and therefore alleges that the libelant did so carry insurance upon its said goods to the amount of $7,000 which insurance by virtue and according to the terms of the said provision of the bill of lading as quoted, the claimant is entitled to the benefit of, and therefore demands of the libelant due proof on oath as to said matter and as to all insurance which it carried upon its said goods.

Third.—In that the Court erred in sustaining the libelant's exception to all that portion of the defendant's original answer, which is as follows:

That by the provisions in section 10 of the said bill of lading issued to and received by the libelant upon its said shipment of goods on the "Santa Ana," it was provided as follows: "It is agreed that no lien shall attach to any of the vessels employed in the performance of this contract or any breach thereof, but such lien is hereby waived." Claimant alleges that under and by virtue of said provision the said libelant absolutely waived any claim against the said vessel "Santa Ana," and that the said libelant has no claim whatever against the said vessel for any portion of the said general average, or for or on account of the matters sued on in the said libel, but the said libelant's sole remedy and claim is against the owners and agents of said vessel in personam.

Fourth.—In that the Court erred in sustaining the libelant's exception to all that part of the defendant's original answer which is as follows:

That at the time of the arrival of said vessel at Nome, there was no goverment or courts or other officials before whom the matter of the contribution and general average could have been ascertained, readjusted and assessed or paid, and that by reason of their absence and by reason of the necessity of the case, and for the benefit of the libelant and all others inter-

terested in the cargo of the said vessel, the agents of said vessel selected one Walter W. Gollin, the Marine Surveyor for the Board of Marine Underwriters of San Francisco, as an expert and a person learned in said matters, to adjust the amount of damage upon all goods, and the agents of said vessel informed the agents and representatives of said Standard Theater Company of said appointment, and thereupon and at the request of the Standard Theater Company, acting through its duly authorized agents, the said Walter W. Gollin did proceed to estimate and adjust the loss or damage to the goods of the said Standard Theater Company, and thereupon and in pursuance of said appointment on behalf of the owners of the said vessel, and in pursuance of his employment and by and at the request of the said Standard Theater Company, the said Walter W. Gollin, together with the agents and representatives of the said Standard Theater Company, did proceed to open and appraise all of the packages and merchandise shipped by them on the said vessel, and after a full and careful examination thereof, did estimate the total amount of damage to the goods and shipped by the said Standard Theater Company at the sum of $3,617.03, which appraisement and adjustment was assented to and approved by the said Standard Theater Company and thereupon and on the basis of the said appraisement as the final

amount of damage to its said goods which the said Standard Theater Company would be entitled to, the said Standard Theater Company was by the said vessel allowed to take and remove all of its said goods; that the owners and agents of the said vessel have not since had an opportunity to make any further examination of said goods and at no time since the delivery of the said goods has it been possible to make any such re-examination thereof or of the damage thereto, and that the said libelants by receiving and accepting the said goods under and pursuant to the said adjustment and appraisement, as made by Walter W. Gollin, are estopped to object to or contest the sufficiency and finality thereof.

Fifth.—In that the Court erred in sustaining the libelant's exception to the interrogatory designated "A" attached to and filed with the claimant's original answer.

Sixth.—In that the Court erred in sustaining libelant's exception to interrogatory designated "B" appended to and filed with the claimant's original answer.

Seventh.—In that the Court erred in sustaining the libelant's exception to paragraphs 1, 2, 3, and 4 of the First Affirmative Defense in claimant's amended answer to the libelant's amended libel.

Eighth.—In that the Court erred in holding that the appraisement made by W. W. Gollin at Nome,

Alaska, of the amount of damage to libelant's goods was not binding upon the libelant as fixing the amount of said damage for the purpose of general average adjustment.

Ninth.—In that the Court erred in holding that the general average adjustment made by W. C. Gibbs of San Francisco was fair, just and accurate, and binding upon the parties to this cause.

Tenth.—In that the Court erred in rendering decree in this case in favor of the libelant for the sum of fifteen thousand three hundred and seven dollars and sixty-nine cents, because there is not sufficient evidence in this cause to support such a decree for that amount, the same being excessive.

Eleventh.—In that the Court erred in rendering any decree in this cause for the libelant, because there was not sufficient evidence in this cause to support any decree for the libelant, and the said decree is not supported by sufficient evidence and is contrary to the law of the case.

H. S. GRIGGS,
PETERS & POWELL,

Proctors for the Claimant and Appellant Charles Nelson Company.

Service of the foregoing assignment of error and receipt of a true copy thereof admitted and acknowledged this second day of July, 1906.

WM. H. BRINKER,

Proctor for Libelant Standard Theater Company.

[Endorsed]: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington. Jul. 3, 1906. R. M. Hopkins, Clerk. A. N. Moore, Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

No. 2438.

THE STANDARD THEATER COMPANY,
Libelant,

vs.

American Steamship "SANTA ANA," Her Tackle, Apparel, etc.,
Respondent.

THE CHARLES NELSON COMPANY,
Claimant.

Bond on Appeal.

Know all men by these presents, that we, The Charles Nelson Company, a corporation, as principal, and The Aetna Indemnity Company, as surety, are held and firmly bound unto the Standard Theater Company, a corporation of the State of Washington, in the full and just sum of five thousand two hundred and fifty dollars, to be paid to the said Standard Theater Company, its certain attorneys, successors or assigns, to which payment well and truly to

be made we bind ourselves, our heirs, administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 5th day of July, A. D. 1906.

Whereas, lately at a district court of the United States for the Western District of Washington, Northern Division, in a suit depending in said court in admiralty between said Standard Theater Company above named, as libelant, and the steamship "Santa Ana," her tackle, apparel, etc., respondent, and The Charles Nelson Company, claimant, a decree was rendered against the said Charles Nelson Company, and the said Charles Nelson Company having given notice of appeal from said decree and having duly served the same upon the proctor for the said Standard Theater Company, and upon the clerk of the above-entitled court, and having filed the same in the office of the clerk of said court, to reverse the decree in the aforesaid suit,

Now, the condition of this obligation is such that if the said Charles Nelson Company shall prosecute its appeal to effect, and answer all damages and costs if the said appeal is not sustained, and shall abide by and perform whatever decree may be rendered by the said United States Circuit Court of Appeals on said appeal, or on the mandate of the said Circuit Court of Appeals by the said District Court of the

United States for the Western District of Washington, Northern Division, then this obligation to be void, else to remain in full force and virtue.

THE CHARLES NELSON COMPANY,
By PETERS & POWELL,
Its Attorneys.

THE AETNA INDEMNITY COMPANY, [Seal]
J. M. E. ATKINSON,
Assistant Secretary.
By W. J. J. ROBERTS,
Its Attorney in Fact.

Sealed and delivered in the presence of:
H. B. MARTIN.

[Endorsed]: Supersedeas Bond on Appeal. Filed in the U. S. District Court. Western Dist. of Washington. Jul. 5, 1906. R. M. Hopkins, Clerk. H. M. Walthew, Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

No. 2438.

THE STANDARD THEATER COMPANY,
Libelant,

vs.

American Steamship "SANTA ANA," Her Tackle, Apparel, etc.,
Respondent.

THE CHARLES NELSON COMPANY,
Claimant.

Order Fixing Supersedeas Bond.

This cause having come on to be heard upon the petition of The Charles Nelson Company, claimant herein, for an order of this Court fixing the amount in which the said claimant shall give bond to operate as a supersedeas bond upon appeal by the said claimant from the decree of this court heretofore entered on the 1st day of May, A. D. 1906.

It is hereby ordered that such bond shall be in the sum of five thousand dollars, and that upon the said claimant giving bond in such sum, and in the further sum of two hundred and fifty dollars, with sufficient surety, conditioned according to the law and rules of this court, and of the United States

Circuit Court of Appeals for the Ninth Circuit, the same shall be effective both as a bond on appeal and a supersedeas bond.

Done in open court this 2d day of July, A. D. 1906.

C. H. HANFORD,
Judge.

[Endorsed]: Order Fixing Appeal and Supersedeas Bond. Filed in the U. S. District Court, Western Dist. of Washington. Jul. 9, 1906. R. M. Hopkins, Clerk. H. M. Walthew, Deputy.

In the United States District Court, Western District of Washington, Northern Division.

IN ADMIRALTY.

No. 2438.

THE STANDARD THEATER COMPANY,
Libelant,

vs.

American Steamship "SANTA ANA," Her Tackle, Apparel, etc.,
Respondent.

THE CHARLES NELSON COMPANY,
Claimant.

Stipulation Extending Time for Filing Apostles on Appeal.

It is hereby stipulated and agreed by and between the parties hereto that the appellant, The Charles Nelson Company, shall have thirty days from and after this date within which to docket this cause and file the record thereof with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 1st day of August, A. D. 1906.

WM. H. BRINKER,
Proctor for Libelant.
PETERS & POWELL,
Proctors for Claimant.

[Endorsed]: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington. Aug. 1, 1906. R. M. Hopkins, Clerk. H. M. Walthew, Deputy.

In the United States District Court, Western District of Washington, Northern Division.

IN ADMIRALTY—No. 2438.

THE STANDARD THEATER COMPANY,

Libelant,

vs.

American Steamship "SANTA ANA," her Tackle, Apparel, etc.,

Respondent.

THE CHARLES NELSON COMPANY,

Claimant.

Order Extending Time for Filing Apostles on Appeal.

Upon stipulation of the parties hereto this day filed, it is hereby ordered that the appellant, The Charles Nelson Company, have until thirty days from and after this date within which to docket this cause and file the record thereof with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Done and entered this 1st day of August, A. D. 1906.

C. H. HANFORD,

Judge.

[Endorsed]: Order. Filed in the U. S. District Court, Western Dist. of Washington. Aug. 1, 1906. R. M. Hopkins, Clerk. H. M. Walthew, Deputy.

In the United States District Court, Western District of Washington, Northern Division.

IN ADMIRALTY—No. 2438.

THE STANDARD THEATER COMPANY,
Libelant,

vs.

American Steamship "SANTA ANA," her Tackle, Apparel, etc.,
Respondent.

THE CHARLES NELSON COMPANY,
Claimant.

Stipulation as to Original Exhibits.

It is hereby stipulated by and between the parties hereto that the clerk of the above-entitled court, in preparing the apostles on appeal, shall not be required to make copies of the exhibits constituting a part of the evidence in the case, but that such original exhibits, in lieu of copies thereof, may be incorporated into and constitute a part of such apostles and record on appeal.

WM. H. BRINKER,
H. S. GRIGGS,
PETERS & POWELL,
Proctors for Appellant.

[Endorsed]: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington. Aug. 15, 1906. R. M. Hopkins, Clerk. A. N. Moore, Deputy.

In the United States District Court, Western District of Washington, Northern Division.

IN ADMIRALTY—No. 2438.

THE STANDARD THEATER COMPANY,
Libelant,

vs.

American Steamship "SANTA ANA," her Tackle, Apparel, etc.,
Respondent.

THE CHARLES NELSON COMPANY,
Claimant.

Order as to Original Exhibits.

The parties hereto having stipulated, in writing, that the original exhibits constituting a part of the evidence in this case may be used by the clerk of this court in making up the apostles and record on appeal—

It is hereby ordered that the clerk of this court may, in preparing such apostles and record on appeal, use such original exhibits in lieu of copies thereof.

Done and ordered this 15th day of August, A. D. 1906.

C. H. HANFORD,
Judge.

[Endorsed]: Order. Filed in the U. S. District Court, Western Dist. of Washington. Aug. 15, 1906. R. M. Hopkins, Clerk. A. N. Moore, Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

No. 2,438.

THE STANDARD THEATER COMPANY,
Libelant and Appellee,

vs.

The American Steamship "SANTA ANA," her Tackle, etc.,

THE CHARLES NELSON COMPANY,
Claimant.

Clerk's Certificate to Transcript.

United States of America,
Western District of Washington,—ss.

I, R. M. Hopkins, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify the foregoing seven hundred and thirteen (713) typewritten pages, numbered

from 1 to 713, inclusive, to be full, true and correct copies of so much of all the files, records and proceedings, and the entire record, in the above and therein entitled cause, as is required to be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit upon an appeal pursuant to Rule 4 of the Admiralty Rules of said Court, save and excepting the exhibits introduced in evidence and used upon the hearing of said above and therein entitled cause, which original exhibits I have certified and transmit herewith, and as a part hereof, pursuant to order of the above-entitled court, a copy of which will be found on page 713 hereof; and that the foregoing pages, together with said original exhibits, constitute the record on the appeal taken in said cause by the claimant above named, The Charles Nelson Company, to the United States Circuit Court of Appeals for the Ninth Circuit

I further certify that the originals of each and all of such files, records and proceedings now remain on file and of record in my office as such clerk at Seattle, in said district.

I further certify that the cost of preparing and certifying the foregoing record on appeal is the sum of $653.10, and that said sum has been paid to me by Messrs. Peters & Powell, attorneys for said claimant and appellant, The Charles Nelson Company.

In witness whereof I have hereunto set my hand and affixed the seal of said District Court this 25th day of August, 1906.

[Seal] R. M. HOPKINS,
Clerk.
By H. M. Walthew,
Deputy Clerk.

[Endorsed]: No. 1367. United States Circuit Court of Appeals for the Ninth Circuit. The Charles Nelson Company, Claimant of the American Steamship "Santa Ana," her Tackle, Apparel, Furniture, Engines, Boilers and Machinery, Appellant, vs. The Standard Theater Company, Appellee. Apostles on Appeal. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed August 31, 1906.

F. D. MONCKTON,
Clerk.

In the United States District Court, Western District of Washington, Northern Division.

IN ADMIRALTY—No. 2438.

THE STANDARD THEATER COMPANY,
Libelant,

vs.

American Steamship "SANTA ANA," her Tackle, Apparel, etc.,
Respondent.

THE CHARLES NELSON COMPANY,
Claimant.

Order Extending Time to File Apostles on Appeal.

Upon stipulation of the parties hereto this day filed, it is hereby ordered that the appellant, The Charles Nelson Company, have until thirty days from and after this date within which to docket this cause and file the record thereof with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Done and entered this 1st day of August, A. D. 1906.

C. H. HANFORD,
Judge.

[Endorsed]: Original. No. 2438. In the District Court of the United States, District of Washington,

Northern Division. The Standard Theater Company, Libelant, vs. American S. S. "Santa Ana," Her Tackle, etc., Respondent. The Charles Nelson Company, Claimant. Order. Filed in the U. S. District Court, Western Dist. of Washington. Aug. 1, 1906. R. M. Hopkins, Clerk. H. M. Walthew, Deputy.

No. 1367. United States Circuit Court of Appeals for the Ninth Circuit. The Charles Nelson Company, Claimant, etc., vs The Standard Theater Company. Order Extending Time to File Apostles on Appeal. Filed Aug. 30, 1906. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

THE STANDARD THEATER COMPANY (a Corporation),

Appellee,

vs.

THE CHARLES NELSON COMPANY (a Corporation),

Appellant.

Notice of Appeal (Original).

To William H. Brinker, Proctor for the Above-named Appellee:

You are hereby notified that the apostles on appeal in this cause have been filed in the United States Circuit Court of Appeals, for the Ninth Circuit, with the clerk thereof, at San Francisco, California.

PETERS & POWELL,
Proctors for Appellant.

Service of within notice this 22d day of Sept., 1906, and receipt of a copy thereof, admitted.

WM. H. BRINKER,
Proctor for Libelant.

[Endorsed]: No. 1367. In the U. S. Circuit Court of Appeals, Ninth Circuit. The Standard Theater Company (a Corporation), Appellee, vs. The Charles Nelson Company (a Corporation), Appellant. Original. Notice of Appeal. Filed Oct. 2, 1906. F. D. Monckton, Clerk.

No. 1367

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CHARLES NELSON CO., Claimant of the American Steamer "Santa Ana,"
Appellant.

vs.

THE STANDARD THEATRE CO.,
Appellee.

APPELLANT'S BRIEF.

NATHAN H. FRANK,
Proctor for Appellant.

Upton-Williams Co., 112 Hayes Street

No. 1367

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CHARLES NELSON CO., Claimant of the American Steamer "Santa Ana,"

Appellant.

vs.

THE STANDARD THEATRE CO.,

Appellee.

APPELLANT'S BRIEF.

STATEMENT OF FACTS.

In June, 1900, the steamer "Santa Ana" was on a voyage from Seattle to Nome with passengers and a general cargo of merchandise.

Fire broke out in the cargo, and, for the general safety, it became necessary to inject steam into the hold for the purpose of extinguishing the fire. It took some three days to subdue it. (p. 197.) After the fire was extinguished the hatches were removed and a portion of the cargo, totally damaged, was cast overboard.

The vessel then proceeded to her destination at Nome, Alaska, where her cargo was discharged, and much of it found damaged by fire, smoke and steam.

There was at that time no government, courts, nor any other means at Nome by which contribution in general average could have been made, ascertained, adjusted, assessed or paid. (Libel, Art. VII, p. 17.)

Arrangements were therefore made with Mr. Gollin, a representative of the San Francisco Board of Marine Underwriters, to survey and assess the damage to the cargo.

On account of the conditions then prevailing it was impossible to secure general average bonds (p. 778), and as the cargo-owners, including the libelant, were extremely anxious to possess themselves of their goods, to the end that they might proceed with their venture, it was arranged at first that they should make a deposit equal to ten per cent of the value of the goods, to cover general average.

Before the examination of the cargo had proceeded very far, it was concluded that it would be fair to allow in every case a minimum *damage* of ten per cent, and inasmuch as this damage equalled the amount of the deposit, the latter was waived, and the deposits all immediately returned to consignees.

The adjuster then made an examination of the goods and issued to each shipper a certificate showing the amount of damage found by him. (pp. 771-2.) In this arrangement the libelant participated, and a certificate was issued to him showing a total damage of $3,617.03 by

fire and steam. The libelant now contests that award on the ground that the examination of his goods was not thorough.

Subsequently, and immediately upon the return of the vessel to the port of San Francisco, to wit, in October, 1900, the matter was placed in the hands of an average adjuster for adjustment (p. 144), and everything within reason done by the ship-owner to forward the same. Owing, however, to the nature of the case and the illness and subsequent death of the adjuster, the matter passed into the hands of a second adjuster, and was not completed until December, 1902. Originally, the libelant had furnished the adjuster with affidavits evidencing a total damage by *fire,* steam and water, of $12,339.68. (See adjustment, Malloy's affidavit of July 16, 1900.) Subsequently, and in April, 1902, and July 10, 1902, these affidavits were amended so as to increase the damage claimed to $17,272, *exclusive of the damage by fire.* (p. 100.) These latter affidavits form the basis of the adjustment in question. (pp. 121-122.)

When the adjustment was finally concluded, the ship-owner refused to accept it as a true or correct adjustment, and alleged, among other things, that the amount of the loss and damage of this libelant was greatly inflated and incorrect.

That the adjustment was not a true or correct adjustment seems conceded by all parties.

Mr. La Boyteaux, the representative of Johnson-Higgins, the adjusters, himself says that it was not an accurate adjustment, but simply the best they could do

under the circumstances, because the proofs were not then obtainable. With respect to the claim of the libelant, the adjustment was based upon the second affidavit, made two years afterwards, and without anything to check it up. (pp. 121-2.) The learned District Court also recognizes that the adjustment is not correct, though he thinks it is not unfair to the ship-owner. We contend that even in that conclusion he has erred. (pp. 866-7.)

It further appears in the evidence, that the libelant's goods were shipped under a bill of lading containing, among others, the following provisions:

(a) "General average, if any, to be adjusted according to the York-Antwerp Rules of 1890."

(b) "It is agreed that no lien shall attach to any of the vessels employed in the performance of this contract for any breach thereof, and such lien is hereby waived."

(c) "It is further stipulated and agreed that in all cases of loss of any portion or the whole of said goods and merchandise, the amount of claims shall be restricted to the cash value of such goods or merchandise at the original port of shipment, and that all claims for either partial or total loss or *damage* shall be ascertained and *adjusted* upon the same basis of value."

(d) "In the event that said Seattle & Yukon Transportation Company shall become liable for any injury, damage or loss to said property, it shall receive the benefit of any insurance thereon in favor of the shipper, owner or consignee."

The learned District Court held that these provisions of the bill of lading did not qualify or in anywise relate to a claim in general average and therefore, upon exceptions to the answer, ruled out all defenses based upon the foregoing provisions of said bill of lading.

The cause having proceeded to trial, evidence was introduced by the libelant,—no doubt upon the theory that, on account of its conceded inaccuracy, the adjustment was not binding,—with a view of having the court make an adjustment. The court, however, held that the adjustment made by Johnson-Higgins was "approximately correct and just and certainly not unfair to the owner of the ship" (p. 866), and ordered a decree in favor of the libelant and against the ship-owner for the *total amount* stated in said adjustment as due to said libelant *from all contributing interests,* notwithstanding the adjustment awards against the ship and freight only such proportion thereof as $91,928 bears to $157,082. (p. 153.)

It is the contention of the appellant that the court erred, first, in disregarding the above mentioned provisions of the bill of lading in determining the ship-owner's liability; second, in adopting the inaccurate and imperfect adjustment of Johnson-Higgins as a true adjustment, and basing his judgment thereon; three, if the said adjustment be conceded to be the basis of libelant's right, then the court erred in entering judgment against the ship-owner for the entire amount to be contributed to the libelant, instead of for the ship's individual proportion or contribution.

I.

THE COURT ERRED IN DISREGARDING THE PROVISIONS OF THE BILL OF LADING IN DETERMINING THE SHIP-OWNER'S LIABILITY.

As already indicated, the bill of lading contained a provision that general average, if any, should be adjusted according to the York-Antwerp Rules of 1890. These rules provide what shall, and what shall not, constitute general average acts, and also provide what shall, and what shall not, contribute in general average, as well as the method and mode of adjustment (pp. 752-762.)

By this provision of the bill of lading, therefore, the entire question of general average, as set forth in those rules, *is incorporated in and made a part of the bill of lading.*

It cannot, therefore, be said, that in this case, as between individual consignees and the ship, the conditions by which the right to contribution in general average against the ship shall be controlled, were not a part of the contract of carriage.

We therefore contend that the following provisions of the bill of lading hereinabove referred to, being also a part of the contract of carriage, should have been given full effect, namely:

(b) "It is agreed that no lien shall attach to any of the vessels employed in the performance of this contract for any breach thereof, and such lien is hereby waived."

(c) "It is further stipulated and agreed that in all cases of loss of any portion or the whole of said goods

and merchandise, the amount of claims shall be restricted to the cash value of such goods or merchandise at the original port of shipment, and that all claims for either partial or total loss or *damage* shall be ascertained and *adjusted* upon the same basis of value."

(d) "In the event that said Seattle & Yukon Transportation Company shall become liable for any injury, damage or loss to said property, it shall receive the benefit of any insurance thereon in favor of the shipper, owner or consignee."

Upon this subject, however, the learned District Court held that the office of the bill of lading is to provide for the rights and liabilities of parties in reference to the contract of carriage, *and is not concerned with the liabilities for general average;* that hence, stipulations in the bill of lading exempting the carrier of the ship from liability for all damages and loss arising from certain causes specified, will not create an exemption from liability for contribution in general average.

The only authority cited by the court for this proposition is the American and English Encyclopædia of Law, 2nd Edition. While not meaning to criticize the use of that work as authority for general principles, we do not think it can safely be relied upon where distinctions arise by reason of variation in the facts to which the principle applies, nor indeed where a careful analysis of conflicting decisions is required.

Whatever may be said upon the general proposition that the right to contribution in general average does or does not arise out of the contract of carriage,—and

as to this we hope to show that it does so arise,—it is certain that this case lies within an exception recognized even by those authorities that lay down the rule announced by the learned District Judge. This exception is due to the express incorporation into the bill of lading, as above indicated, of the rules providing when, and under what conditions, general average shall be awarded.

The question has been the subject of much academic discussion in both England and America, and has in the former country been finally settled by a decision of the House of Lords.

In many cases dicta may be found where the courts seemingly overlook the fundamental principles underlying legal obligations, but the following cases best illustrate the final development of the question.

In STEWART vs. WEST INDIES & PACIFIC STEAMSHIP CO. (1873) L. R. 8 Q. B. 88, 362, the bill of lading provided: "Average, if any, to be adjusted according to British custom." The plaintiffs' cargo was destroyed by water poured into the ship's hold to extinguish a fire. It was held that the plaintiffs were *not entitled to a general average contribution* because, according to British custom, such a loss was not a general average loss. This would seem to be a direct recognition of the principle that the right to general average is controlled by the terms of the contract of carriage.

SCHMITT vs. ROYAL MAIL STEAMSHIP CO. (1876), 45 L. J., Q. B. 644, and CROOKS VS. ALLAN (1879), 5 Q. B. D., 38, 40, find their ratio decendi in the following language of Lord Justice Lush:

"The office of the bill of lading is to provide for the rights and liabilities of the parties in reference to the contract of carriage, and is not concerned with liabilities to contribution in general average,"
adding, however,
"and *unless the contrary appears,* the words must be so construed."

In the CARRON PARK (1890), 15 P. Div., 203, the charter-party provided that the ship-owners should be relieved from liability for the negligence of their servants. Of course, it is well settled law that no one is entitled to contribution in general average where the loss arises from his negligence. It was, however, in this case held, that, inasmuch as the ship-owner was, *under the terms of the charter-party,* not responsible for the negligence of his servants, he was entitled to contribution in general average, notwithstanding the loss arose from such negligence.

That case has ever since been the law of England. As said in MILBURNE vs. JAMAICA FRUIT CO., (1900), 2 Q. B. 540:

"The decision in the Carron Park has been acted upon in practice in this country ever since it was given, and we are now asked to overrule it. It was expressly approved of by Gorrell Barnes, J., in the Mary Thomas, and my Brother Mathew does not doubt its accuracy in his judgment now appealed from; and in my opinion, it correctly followed out the decision of the Privy Council delivered by Lord Watson in Strang, Steel & Co. vs. Scott & Co. I believe the Carron Park is in accord with

the law of England relating to general average in this country."

It will be observed that in the CARRON PARK no mention is made in the charter-party of general average, but the clause providing exemption for negligence is a general clause disassociated from any provision as to general average. As this is now the law of England, it would seem to indicate that the limitation announced by Lord Justice Lush, viz., that "unless the contrary appears," the words of the bill of lading must be construed as not relating to liability to contribution in general average, is thereby overruled.

We do not wish, by the foregoing, to be understood as maintaining that, in this country, a stipulation relieving a carrier from liability for negligence would be valid, for it is not. But the stipulations in the present bill of lading are not negligence exemptions. Inasmuch as the negligence exemption *is* valid in England, the fact that it is not valid here does not affect the question. It stands in the same relation to the present question as if it were one of the provisions now under consideration.

The principle, however, that, *independent of the terms of the bill of lading,* as between ship and cargo the right to general average arises out of *implied contract* and not out of some anomalous obligation of justice or equity was definitely settled by the House of Lords in the case of ANDERSON vs. OCEAN STEAMSHIP CO. 10 App. Cas. 107.

In that case, the question arose as to whether or not a cargo-owner was liable to contribution in general aver-

age for a salvage disbursement made by the owner of the ship. The claim of the ship-owner was stated in the following language:

"In consideration that the plaintiffs at the request of the defendants had taken on board a ship of the plaintiffs, called the Achilles, certain goods of the defendants to be carried on board of the said ship from Hankow to London, the defendants promised that they would contribute and pay their just share and proportion in respect of the said goods of any general average loss that might arise or happen to the ship during the said voyage."

Of this the court said:

"I think that the promise stated in the first paragraph of the statement of claim is one *that would be implied by law in every contract for the carriage of goods.*"

So, we have as the settled law of England, not only the rule that the exemptions of the bill of lading apply to a general average liability as well as to all others, but also the unfettered proposition that general average liabilities are part of every contract for the carriage of goods, by implication of law, and not by the imperfect obligation of general justice or equity.

In this country the question has been more or less discussed from an academic point of view, but never, so far as we are advised, has it been directly passed upon except in two cases, to which we shall presently refer.

The history of this discussion is reviewed in RALLI VS. TROOP, 157 U. S., 394, et. seq. That the court did not deem it necessary in the case before it to determine the question is apparent from the following:

"There has been much discussion in the books as to whether the right to a general average contribution rests upon natural justice or upon an implied contract or upon a rule of the maritime law known to, and binding upon, all owners of ships and cargoes, but the distinction has been rather as to forms of expression than as to substantial principles or legal results."

In its review of the English cases ANDERSON vs. OCEAN STEAMSHIP CO. does not seem to have been noticed.

In the ROANOKE however, 59 Fed. 161, the question for the first time, as we think, comes up squarely for decision. The ruling is, however, based upon SCHMIDT VS. STEAMSHIP CO., and CROOKS VS. ALLAN, both of which, as we have already seen, are no longer law in England. So far, therefore, as the ROANOKE rests upon authority, it must be erroneous.

The ROANOKE is also to be distinguished from the case at bar in this, that it does not appear that the bill of lading contained any provision concerning general average. In fact, it does appear that the bill of lading was one for a carriage by water *or rail* (p. 165). Accordingly the court said that "the terms here employed do not warrant a holding that it [general average] was *in the minds of the parties to this contract of affreightment as touched thereby.*"

If the rule in Crooks vs. Allan be accepted, the foregoing fact would bring the Roanoke within that rule, while the facts in the case at bar would bring *this* case within the exception, because the terms employed *do*

warrant a holding that general average was in the minds of the parties to this contract of affreightment as touched thereby.

In WELLMAN VS. MORSE, 76 Fed. 573, the Circuit Court of Appeals for the First Circuit held precisely as did the House of Lords in ANDERSON VS. OCEAN STEAMSHIP CO., that the owners of a cargo are liable on an implied promise for general average, thus distinctly establishing in this country that the liability to contribution in general average arose out of contract, and not out of some indefinite obligation.

The French law in this particular is the same as that laid down in Carron vs. Park. See the Irrawaddy, 171 U. S. 199, et seq.

THE IRRAWADDY, 171 U. S. 187.—Some reference has been made to the Irrawaddy as laying down a contrary principle, but the question was not involved in that case. The only question raised was what effect on general average the Harter Act had because of the provision releasing ship-owners "from loss resulting from faults or errors in navigation or in the management of said vessel," etc. In passing upon the question, the court concluded: (p. 195.)

"But whatever may be the English rulings as to the effect of contract immunity from negligence as entitling a ship-owner to claim in general average, *we do not think the cases are parallel.* By the English law the parties are left free to contract with each other, and each party can define his rights, and limit his liability as he may think fit. *Very different is the case where a statute* pre-

scribes THE EXTENT OF HIS LIABILITY AND EXEMPTION.

Upon the whole we think that in determining the effect of this statute in restricting the operation of general and well-settled principles, our proper course is to treat those principles as still existing, and *to limit the relief* from their operation *afforded by the statute to that called for by the language itself of the statute.*"

In other words, the court refused to extend the operation of the statute by implication, but confined it to the purpose stated.

In the words of the court, "We do not think the cases are parallel."

In view of the foregoing, we respectfully submit that the provisions of the bill of lading in question apply as well to liability for general average as to any other loss or damage. If so, under the provision of the bill of lading hereinbefore marked "(b)", the libel in this case should be dismissed.

Bill of Lading provision marked "(c)."—It will not be overlooked that this provision of the bill of lading hereinbefore quoted contains a stipulation that "all claims for . . . damage shall be *ascertained and adjusted* upon the same basis of value." The word "adjusted," used in this connection, bears no reasonable construction other than as referring to an adjustment in general average, for, outside of an adjustment in general average, there is nothing further to be done after the claim is "ascertained" other than to settle or pay, but, in general average, before the settlement or payment

there must be an adjustment in order to ascertain the contributory amounts. If this be so, that provision of the bill of lading has certainly been disregarded in making up the adjustment here under consideration.

Bill of Lading Provision Marked "(d)."—It also appears that the libelants have insurance to the extent of $15,000 on this property to the benefit of which the ship-owner would be entitled under this provision.

II.

IF THE ADJUSTMENT BE CONCEDED TO BE THE BASIS OF LIBELANT'S RIGHT, THEN THE COURT ERRED IN ENTERING JUDGMENT AGAINST THE SHIP-OWNER, FOR THE ENTIRE AMOUNT TO BE CONTRIBUTED TO THE LIBELANT, INSTEAD OF FOR THE SHIP'S INDIVIDUAL OR PROPORTIONAL CONTRIBUTION.

1. We do not overlook the allegation in the libel (Art. VI, p. 17), that the master delivered the cargo at Nome to the consignees without taking or demanding any bond or other security for the payment of contributions in general average. This allegation is not supported by the evidence, as we shall presently see. Nevertheless we contend that the mere fact of delivery of the cargo without taking security, is not in itself sufficient to charge the ship with the entire contribution.

It will be noted that the libel also states (Par. VII, p. 17), "That there was at said Nome at the time of the arrival and discharge of said vessel, no government, courts nor other means by, under, or through which contribution in general average could have been *ascer-*

tained, adjusted, assessed or paid." Hence, if called on to detain the cargo, the master would have no alternative other than to bring it back to the port of departure where "contribution in general average *could* have been ascertained, adjusted, assessed or paid." A detention of the goods for the purpose of enforcing the lien, was, therefore, impracticable, and in any event would have been ruinous to all of the consignees alike, the libelants as well as the rest.

The evidence is also undisputed that an average bond was impracticable, which must also be apparent from the conditions mentioned in the foregoing article of the libel.

Having this in view, the evidence shows that reasonable efforts were made to adjust the damage by such means as were at hand, and to obtain such security as was then practicable.

In the language of the adjuster's certificate (Libelants' Ex. 5, p. 151), "The charterers at once procured the services of a Mr. Gollin, surveyor of the Board of Marine Underwriters of San Francisco, to examine and report upon the damage to the cargo. Owing to the peculiar conditions existing at Nome most of the consignees were in a great hurry to get their merchandise, even though it was damaged to a considerable extent; therefore, after a conference between the charterers and Mr. Gollin, it was decided to let those consignees who were not insured, and whose goods were damaged *over ten per cent,* take their merchandise, without making any deposits, in consideration of their agreeing not to make any claim in

general average for damage to the same—ten per cent having been fixed upon as an estimated percentage of general average. Those whose goods were delivered sound, and damaged *under ten per cent* of their value, were required to make a deposit. Those consignees who gave satisfactory proof that they were insured were allowed to take their merchandise without making a deposit. An examination and report upon the condition of the goods was made in each case by Mr. Gollin where there was no possibility of any claim being made, *i. e.*, those cases where the damage was under ten per cent, and the consignees did not waive their claim, and those cases where the goods were insured."

This statement is supported by the testimony of Mr. Gollin (p. 159), and that of Mr. Wood (pp. 767-8; 771-2-3).

We have, then, at least this much security retained for contribution in general average. All goods damaged in excess of ten per cent were released, because their damage was thought sufficient to release them from any liability to contribute, and all contribution to which *they* would be entitled was waived. So far as such goods are concerned the libelants suffered no damage, but, on the contrary, reaped a benefit, because they (libelants) were relieved from contributing to the excess damage of such cargo. The cargo *that was insured* had sufficient security behind it, without an additional bond, because the insurance is liable for the contribution, and the locality of the insurance companies was obtainable.

There does not appear to have been any goods damaged

less than ten per cent (p. 772), and "no goods were delivered from the ship without such an adjustment of damage."

From the foregoing it appears that the representatives of the ship took such *reasonable* precautions as were then and there available to secure proper contribution in general average. If they erred in the amount, that in itself would not render the ship liable for the whole contribution.

The obligation of the owners in respect to taking security for the contribution in general average is no greater than it is in respect to the original general average sacrifice, and in that regard it is settled by the Supreme Court that:

"The obligation of the owner is to appoint a competent master having reasonable skill, judgment and courage; and they are liable if through his failure to possess and exert those qualities, in any emergency, the interest of the shipper is prejudiced, *but they do not contract for his infallability, nor that he shall do, in any emergency,* precisely what, after the event, others may think would have been best."

LAWRENCE vs. MINTON 17 How. 100; 15 L. Ed. 62.

The language of MR. JUSTICE WILLIS, in the case of NOTARA vs. HENDERSON (1872) L. R., 7 Q. B. 225, where the duty of the master to act for the preservation of damaged cargo was under consideration, is applicable to the present case. On the question of fact whether there had been a breach of said duty, he said:

"It is obvious that a proper answer must depend upon the circumstances of each particular case, and that the question, whether active special measures ought to have been taken to preserve the cargo from growing damage by accident, is not determined simply by showing damage done and suggesting measures which might have been taken to prevent it. *A fair allowance ought to be made for the difficulties in which the master may be involved.* . . . The place, the season, the extent of the deterioration, the opportunity and means at hand, the interests of other persons concerned in the adventure, whom it might be unfair to delay for the sake of the part of the cargo in peril, in short, all circumstances affecting risk, trouble, delay and inconvenience, must be taken into account. Nor ought it to be forgotten that the master is to exercise a discretionary power, and that his acts are not to be censured because of the unfortunate result, unless it can affirmatively be made out that he has been guilty of a breach of duty."

The justice of this position with relation to the present controversy cannot be doubted. As said by Lowndes on General Average (p. 336):

"When a ship arrives at its port of destination subject to a claim for general average, the ship-owner finds himself in a position of some difficulty. An obligation, it is now clear as it has long been thought, is imposed on him, not to part with the goods until he has taken *reasonable* measures towards enforcing, as against each consignee, the lien which exists at the moment of the ship's arrival. This he can only do either by detaining the

goods, or by taking from the consignee, before parting with them, some fair equivalent in the shape either of a deposit of money or satisfactory engagement to pay. But it greatly concerns the merchant to obtain his goods without delay, so as not to lose his market; while it is impossible for the ship-owner, without some, and often a long delay, to ascertain the exact amount payable. Some reasonable arrangement, therefore, has to be come to: *and it is by no means easy to determine what arrangement would be reasonable, so as to balance the conflicting claims of ship-owner, merchant, and underwriter.*"

The difficulty of determining what is "reasonable" is evidenced by the discussion which follows, respecting a reasonable or unreasonable average bond, in the course of which appears the following from the judgment of Mathew, J., in HUTH vs. LAMPORT (Lowndes, pp. 339-340). Speaking of the right of a ship-owner to retain the cargo until payment of the amount has been made, the judge says that the authorities to which his attention had been called do not justify the contention that any such right exists, and proceeds:

"If it had been a question of lien, and if the ship-owner had called upon the consignee to deal with his lien, the question of amount would immediately have presented itself, *and a more onerous and difficult position for a ship-owner to place himself in cannot be imagined.* He would be bound to give up the goods upon having a proper tender made to him. In order to enable a proper tender to be made he would be bound to give the necessary information to the consignee; and then he would

run very great risk of asking too much or too little, a risk to the other consignees in the one case, and a risk to the particular consignee in the other."

This seems to state with much fairness the difficulty with which the ship-owner was confronted in the present case, and having done what then appeared to him most reasonable and practicable, he did all that we think the law requires of him.

In this connection, it will not be lost sight of that the foregoing language was used by the court with reference to the landing of cargoes at ports where the facilities of a civilized community, at least, are at the disposal of the master. A reasonable exercise of his authority at such a place would, in the very nature of things, require very much more of the ship-owner than what would be required of him under the conditions here under consideration.

If, therefore, we accept the adjustment, the amount which the ship-owner should contribute to the libelant would be 21 92-100 per cent thereof.

For this reason, if for no other, we respectfully suggest that the decree be set aside.

III.

THE JUDGMENT UPON WHICH THE DECREE IS BASED IS INACCURATE AND IMPERFECT, AND SHOULD HAVE BEEN REJECTED.

1. We think the libelant should be limited to the amount of loss found by Mr. Gollin, and for which he issued a certificate, to wit: $3,617.03.

Assuming that the examination of Mr. Gollin was not as thorough as it might have been, nevertheless, the libelants received the possession of the goods. They knew that the ship was depending upon that survey for the amount of the damage to be claimed by them, and whether it be true or untrue, that they agreed to accept said survey as final, they certainly did accept and take away their goods without any immediate protest, and thus made it impossible for the ship-owner to make any further or other investigation. Not that alone, but they themselves, after making a further investigation, filed an affidavit showing the damage which they had suffered to be only about one-half of that subsequently claimed. On this they rested for a period of two years, when they filed a supplemental affidavit increasing their damage to nearly $20,000. This, in itself, carries with it the badge of fraud. Of course, the ship-owner is powerless to contradict the testimony, for everything is now in the libelant's own hands, but the nature of libelant's own testimony as to values at Nome discloses the free hand with which they have increased their damage. 100 per cent, "200 per cent" of estimated profit is not a circumstance. Claim is made by one witness of "1000" per cent profit.

In the face of this, it must be borne in mind that a very large portion of this cargo was not merchantable cargo at all, but consisted of knocked-down lumber for a theatre, saloon and dance hall, and all the various paraphernalia necessary for carrying on such theater, saloon and gambling den. That it had no market value must be apparent, in that these were individual enterprises in which the element of bargain and sale did not enter. It

must further be borne in mind that these immense profits are based upon the idea that a market could have been found *immediately upon the arrival of the vessel,* for within three or four weeks thereafter the excitement and inflation had subsided, and the disappointed adventurers were disposing of their wares at any price they could get. To some extent this appears in the testimony in this case, but whether it appears to the extent here stated or not, it is an historical fact, of which this court is cognizant, and of which it will take judicial notice.

The whole transaction, therefore, carries upon its face the badge of fraud, and the ship-owner was justified in declining to accept it. The District Court recognizes that it is incorrect, but thinks that "it was fairly and honestly made by a competent adjuster." Granted. The honesty and competency of the adjuster is not in issue. He can only work with the facts that are presented to him, and the fairness and honesty of the libelant who presented the adjuster those facts is the only issue.

2. The testimony shows that a large portion of the goods that were allowed to participate in the general average were injured by fire or smoke, and no segregation is made of the amount of damage done by fire and smoke and that done by steam.

Under these circumstances the entire article should have been thrown out, and not allowed to participate in the contribution.

RELIANCE MARINE INSURANCE CO. vs. NEW YORK & C. MAIL S. S. CO., (C. C. A.), 77 Fed. 317. *Burden of Proof.*—In this case the court found that the

tobacco in question was damaged by what the witnesses "call in varying language, 'smoke, heat and moisture,' or 'smoke and heat,' or saturation with a 'smoky flavor,' and that the tobacco, which is a plant of peculiar sensitiveness, had absorbed the flavor or odor of smoke, whereby its quality was greatly injured."

The court also finds that this damage was caused by two separate means, first, by the natural penetration of the smoke from the fire, and secondly, further damaged by the pressure of steam which carried the smoke and its contents.

That of these two sources of damage, one was not a general average charge, while the other might be.

That is was further impossible to tell the amount of damage which was caused by the pressure of steam, as distinguished from the amount of damage caused by the unaided presence of smoke.

The damage to cargo which was caused by fire or smoke is not allowed in general average. The damage caused by water or by steam which was introduced as a means of suppressing the fire, *is* allowed.

Accordingly, the court held that there being an ordinary and extraordinary smoke damage, and no one could tell how much was ordinary and how much extraordinary, it was unnecessary to consider what might or might not be a proper rule of adjustment in a case where such damages *are* susceptible of an exact separation, and affirmed the decree of the District Court disallowing compensation in general average.

In view of the foregoing decision, we call the attention of the court to the following testimony:

A. G. LANE, Handled the cargo from Company's warehouse to the Standard Theatre warehouse. Part of it was burned, and *all of it scorched and water-soaked and all of it steamed.* A great part of the cargo was ruined. Handled all of that cargo after it was unloaded at Nome.

BAR FIXTURES. "Nothing there but so much scorched lumber." (pp. 304-5.) There was one end of the bar that was considerably charred, and it had to be all scraped off and of course that marred it to a considerable extent. One end of the back bar and front bar was badly scorched, but the rest of it simply came to pieces." (Lane, p. 333.)

MIRROR. A mirror was broken by *heat* in the hold. (Lane, p. 334.)

MATTRESSES. "Scorched on the end so the end was out of the hold below and the wool and everything coming out, and the end that was not scorched was all soaked." (Lane, p. 335.)

GROCERIES. "The groceries were destroyed. There were some few canned tomatoes and a few little things that happened to be away from the fire that did not melt and the water did not do it any material damage." (Lane, p. 336.)

DRUGS. "It was a quick fire and the chloride of lime and paraffine wax was all destroyed by the heat." (Lane, p. 336.)

CHAMPAGNE. "Fared worse than anything in the

hold that was not actually burned. The water just simply—the heat seemed to have ruined it. . . . I recall now that there was some cases we found that were so far from the fire and kind of covered up or something that they were not destroyed, but I should say 70 per cent of the champagne was destroyed." (Lane, pp. 336-7.)

CHAMPAGNE. "A few cases had been close to the fire—some of them—a few cases, I think; a few of them were scorched a little in the first lot." (Peterson, p. 482.)

"*Mostly all* damaged by *heat* and steam. There was one place the fire burned some of the cases, but not many of them, very few."

Q. Were any of the bottles broken by the fire, did you notice?

A. Yes sir—cracked—broken. The bottom was out of some of them—in very bad shape.

"One case was burned through and the others were scorched. Probably six, seven or eight cases were scorched." (Malloy, pp. 500-501.)

GUINNESS WHITE LABEL ALE. "The barrels were scorched." (Lane, p. 337.)

PORTER. "Same as the ale and whiskey."

ABSINTHE. "There was a ten-gallon keg of absinthe —that small stuff, as we call it—some of it was burned." (Lane, p. 338.)

CORKS AND LABELS. "Singed and wet, worthless and out of shape." (Gordan, p. 511.)

CORKS. "Showed discoloration by smoke; singed by fire; indication that it was in close proximity to the fire." (Gordan, p. 534.)

BAR GLASS. "Was broken by heat." (Lane, p. 339.)

"All the wines and bottled stuff was ruined by the heat." (Lane, p. 342.)

SCENERY. "The scenery was stuck stiff and the color run and some of it was scorched." (Lane, p. 346.)

PIANO. "The piano was in a box. The box was scorched on the outside. The piano was not scorched, heat and from the wax and stuff that ran down into it, and otherwise destroyed by moisture." (Lane, p. 368.)

CASE GOODS. "Were smoked. A barrel of crockery ware and glassware considerably. The ends of some of the champagne cases were smoked." (Lane, p. 370.)

WHISKEY. "Some of the barrels of whiskey, two or three of them, were scorched on the outside." (Lane, p. 371.)

DOORS. "Probably a quarter of them scorched on the end." (Lane, p. 371.)

CRAP TABLES. "Scorched on two of them, and one end of it." (Lane, p. 373.)

"It would indicate that it had been pretty hot; it was crusty; at the end of the boards there was a kind of crust that was a plain indication that it was from intense heat that would make wood crumble off like brown charcoal." (Lane, p. 373.)

CARPETS. "Steam and smoke; there was one bunch

I think was scorched a little, but not burned." (Peterson, pp. 492-3.)

LAY OUTS. "The heat completely ruined those." (Gordon, p. 508.)

ROLLS OF PAPER. "Heat had caused the tar to melt." (Gordon, p. 511.)

WINDOW SASHES AND WINDOW FRAMES. "Scorched by fire and showed evidences of heat as well. Generally damaged, probably 30 per cent at least." (Gordon, p. 517.)

DOORS. Damaged in same way as window sashes; some of them scorched.

CORRUGATED IRON. "Outwise of bales showed considerable bruising and apparently some effects of the heat, and was lot of warping." (Gordon, p. 517.)

SKELETON SAFES. "Blistered from the heat; looked like they were through the fire." (Gordon, p. 519.)

SEWER PIPE. "Cracked. Do not know how to account for it unless they were in the neighborhood of the extreme heat. Should say it was damaged through the extreme heat." (Gordon, p. 522.)

CIGARS. "Cases were charred; they had been near the seat of the fire where it had raged the fiercest, and the boxes were charred. A good many of them seemed to be affected by the heat; heat passed through them sufficiently to dry them out." (Gordon, p. 525.)

LIQUORS AND MINERAL WATERS. "No question

but the injury was caused by heat in some form, whether hot water or hot steam or flames, I am not able to say." (Gordon, p. 532.)

GLASS WARE. "The location of the stuff that was broken. . . . led me to the conclusion that the breakage had come from heat." Gordon, p. 533.)

CARPETS, WARDROBES, ROBES AND COSTUMES. "Doubtless smoke had something to do with it." (Gordon, p. 535.)

GLASSWARE. "Were broken; they were supposed to be where there was considerable fire." (Malloy, p. 670.)

In many instances when heat is spoken of, it is assumed that the damage is the result of steam heat, but no attempt is made to distinguish the steam heat from fire heat. As the adjustment for general average shows upon its face that a segregation was attempted, instead of throwing these articles out entirely, it is in that respect erroneous.

3. The District Court admits that it is erroneous with respect to the freight, but concludes that this error is favorable rather than unfavorable, to the claimant.

We have, therefore, three distinct respects in which the adjustment is inaccurate: 1st, By reason of inflated values and inflated items of damage. 2d, By reason of allowing contribution for articles damaged by fire and smoke and steam, without any proper evidence segregating the damage incurred in one respect from that incurred in another. 3d, By reason, as suggested by the

District Court, of failure to include the freight on certain articles.

With this in view, it is not proper for the District Court to give a judgment, which in itself is in the nature of an "average," when there is no difficulty in settling the matter according to the established principles of law and the facts, it being a mere matter of detail.

Respectfully submitted,

NATHAN H. FRANK,

Proctor for Appellant.

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CHARLES NELSON CO.,
Appellant,

vs.

THE STANDARD THEATRE CO.,
Appellee.

No. 1367.

BRIEF OF APPELLEE

Wm. H. BRINKER,
Proctor for Libelant and Appellee.

SEATTLE, WASH.

YERXES PRINTING CO. TIMES BUILDING SEATTLE

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BRIEF OF APPELLEE

To the Honorable, the Judges of the United States Circuit Court of Appeals, for the Ninth Circuit.

The appellant having failed to serve upon the appellee its brief on this appeal, the appellee, hereinafter called the libelant, finds it somewhat difficult to determine what course to pursue. It could ask to have the appeal dismissed and proceed to enforce the decree of the District Court, but it feels that it did not recover, in that Court, all that it was entitled to under the evidence, and as the case is here for trial de novo, and as this Court will consider all of the evidence and render such decree as the District Court should have rendered

The San Rafael, 141 Fed. Rep. 270,

it prefers to submit the whole case to this Court for trial anew.

STATEMENT OF THE CASE.

The libelant shipped upon the steamship "Santa Ana," from Seattle, Washington, to Nome, in Alaska, on a voyage which began May 26th, 1900, a large and valuable cargo, consisting of lumber, furniture, bedding, groceries, wines, liquors, cigars, tents, dry goods, blank books, blanks, printed matter, various kinds of gambling appliances, stage scenery, stage fixtures, stage wardrobes, etc., all for the purpose of establishing and operating, at Nome, Alaska, a theater, and a store and a saloon for the sale of wines, liquors, cigars and gambling appliances.

This cargo belonged to the libelant and was properly and carefully packed, boxed and crated, and shipped upon the "Santa Ana," and stowed below deck in the hold of that vessel in a careful manner.

There was a large amount of other cargo upon that vessel on that voyage, shipped by other persons, than the libelant, the exact amount or value of which does not clearly appear from the evidence. There is some evidence to the effect that libelant's cargo constituted about one-third of the value of the entire cargo, and that the entire cargo was worth more than $100,000, but this evidence is in the nature of an estimate, and may not properly rise to the dignity of proof, although claimant's witness, W. D. Wood, estimates libelant's goods at about one-tenth of the entire cargo. The manifest is in evidence, showing the amount, but not the value of the whole cargo. There is, however, no satisfactory evidence of the value of the entire cargo, other than that belonging to libelant.

The ship was worth from $90,000 to $110,000.

The vessel sailed from Seattle on her voyage on May 26th, 1900, and proceeded to sea, and, when about 700 miles off Cape Flattery on June 2nd, 1900, fire was discovered in the forward hold among the cargo. Efforts were made by the master and crew of the ship to extinguish the fire by pouring water into the hold. This was kept up for some time, but without success. Finally, the master caused the hatches to be battened down tight and then poured live steam into the hold at a pressure of 200 to 240 pounds, for more than fourteen hours. Some of the witnesses say for a much longer time. This proved successful and the fire was mothered by the steam. On June 4th, 1900, the hatches were opened and the hold entered and the seat of the fire examined, and some of the cargo found to be scorched and burned was taken out and thrown overboard. But the extent of the damage was not then ascertained. The vessel then proceeded to Dutch Harbor, and, after a few days, to Nome, where she arrived late in June, 1900. There the quarantine officers, having discovered smallpox aboard, sent her to quarantine at Egg Island, without permitting her to discharge either passengers or cargo. She remained at quarantine about two weeks and then returned to Nome about July 1st to 3rd, 1900, when her cargo and passengers were discharged on the beach.

The steamship did not have sufficient room to properly accommodate all of the cargo in its warehouse on shore, so, by an arrangement made between Mr. W. D. Wood, as the representative of the ship, and certain members of the libelant company, the cargo of libelant was removed to a large tent warehouse belonging to libelant, in Nome, further up town from the beach. It was agreed by the representative of the ship and of libelant

that by such removal neither the ship nor the libelant would lose or waive any rights. The remaining cargo, except a small lot which the consignees abandoned to the ship, was delivered to the several consignees without taking or demanding, in any case, any bonds, security or agreement to contribute in general average, or otherwise, to any loss caused by fire, or by the sacrifice made to extinguish the fire and save the ship and cargo, although there was an attempt, at first, made by the representative of the ship to collect a uniform amount of ten per cent from each consignee; but this was afterwards abandoned, and such sums as had been collected were returned. There was, however, no demand ever made upon the libelant for this ten per cent, nor anything ever said to any one connected with libelant about giving security for any damages that may have occurred on the voyage, for it seemed to be admitted that libelant's cargo had suffered such great damage as to require payment to it rather than contribution by it.

After the libelant's cargo had been removed to its warehouse, a survey was made of it by one W. W. Gollin, who claimed to be a surveyor for the Board of Marine Underwriters of San Francisco.

This surveyor was employed by the ship, and, according to the testimony of himself and of W. D. Wood, represented the ship in making the survey. But the testimony of several witnesses for libelant is, that Gollin claimed to be representing the insurance companies in which libelant's cargo was insured, and those witnesses understood from Gollin's statements that he was endeavoring only to ascertain the extent of the fire loss, or damage done by the fire, for the benefit of the in-

surance companies, and refused to examine any cargo to ascertain the extent of its damage, which did not show burns or scorchings. At all events, it is clear from the great weight of the testimony that the survey made by Gollin was very cursory, superficial and incomplete, and hastily made, without any careful examination, although the representative of libelant insisted that it be more thorough, and constantly objected to the manner in which it was made.

The estimate of the amount of the damage made by Gollin, as shown by his report, when considered in the light of all the testimoney, proves that his alleged examination was perfunctory and his estimate worthless for any purpose. Although while Gollin, in his deposition, uses the words "survey," "appraisement" and "adjustment," it is clear that the most, and the only thing he did, was to examine a part of the cargo belonging to libelant and "survey" or "appraise" the damage it had sustained. There was no pretense of an "adjustment" of the damage in the sense of a settlement of the final amount due to or from libelant to or from the ship, or any other interest concerned, for the evidence shows that Gollin took into consideration, in his so-called "adjustment" nothing but the cargo of libelant, and only so much of that as showed the marks of the fire. He did not consider the amount or the value of the remaining cargo, which he could have done, for the means of information were then accessible to him, nor the amount of damage such cargo sustained, if any, nor the value of the ship, nor the amount of damage it sustained, if any, nor the amount or value of the pending freight.

Libelant's cargo having been delivered to it, and having been surveyed by Gollin, and the libelant being

dissatisfied with the survey and objected thereto, and believing that its cargo had sustained greater damage, especially from the water and steam in the efforts made to put out the fire, than that found by Gollin, immediately caused a further and more careful and thorough examination of its cargo to be made for the purpose of ascertaining the extent of the damage it had suffered, not, however, for the purpose of any general average adjustment, but for the purpose of making its proof of loss to the insurance companies under whose policies its cargo was insured. Believing that it had only ordinary fire insurance (not having the policies, but only a certificate covering the risk, with a promise that the policies would be issued later, which was done), and not being informed of the kind of policy it was entitled to, nor its terms or conditions, assumed that it was an ordinary fire policy and that it would be required to make its proofs of loss within a limited time (which it assumed to be sixty days from the date of the fire), made up its proofs of loss and forwarded them to the agent of the insurance companies within sixty days from the time the fire occurred.

None of the officers of libelant, nor any person connected with libelant, knew, or ever heard anything of "general average," "general average loss," or "general average adjustment," while in Nome, nor until long after their return to Seattle and until after the matter had been referred to an adjuster in San Francisco for adjustment. This is the testimony of all the witnesses for libelant, and it is contradicted by none. Mr. Wood only says that he "is satisfied" that he mentioned it to Mr. Malloy, but could not state it as a fact, but only his

conclusion, or opinion, that he did. This statement Mr. Malloy denies:

After the ship returned from Nome she went to San Francisco, and there the claimant, The Charles Nelson Company, selected Mr. W. C. Gibbs, an adjuster of marine losses, to make an adjustment, in general average, of the loss caused by the sacrifice on this voyage. (See depositions of W. H. La Boyteaux, Record pp. 89, 104, 127, 131 and exhibits thereto; and M. C. Harrison, Record pp. 139, 142 and exhibits thereto.)

After the matter had been thus placed in the hands of Mr. Gibbs for adjustment, the insurance companies, to which libelant had made its proofs of loss, laid those proofs before the adjuster, and the claimant also submitted proofs, and the adjuster called on libelant for additional data, and these were furnished. He also called on W. D. Wood and the claimant who furnished additional information.

Before the adjustment was completed, Mr. Gibbs died, and the adjustment was then undertaken and concluded by Johnson & Higgins, through La Boyteaux and Lowe, and certificates of the result furnished to claimant and to libelant.

Libelant immediately demanded payment from claimant of the amount found due to it from the ship and freight, this, after long and vexatious delays, was finally refused, and this libel filed.

The value of the vessel was from $90,000.00 to $110,000.00

The value of the pending freight was, according to Wood, $3,427.72, although libelant paid nearly $6,000.00 freight on its cargo. The value of the cargo belonging

to libelant, if it had arrived at its destination in good order, was, on the basis of 100 per cent. increase over cost, with freight prepaid and similarly increased $77,-684.30.

There is no satisfactory evidence of the value of the entire cargo.

In the absence of testimony of the value of the entire cargo, the adjustment, to be made in this cause, will, necessarily, be confined to the value of the ship, the freight and the cargo of libelant, and the losses sustained by each in the sacrifice.

Of the cargo saved by libelant, the evidence shows there was sold at Nome all that was of any value and that $21,000.00, gross, was realized, and that the expenses and commissions expended in making the sales amounted to $6,000.00 (Rec., p. 579), leaving as realized from the entire cargo owned by libelant but $15,000.00, net. There was a small amount of that cargo left at Nome, but nothing was ever realized from it, so that may be considered as worthless.

In estimating the value of libelant's cargo, or rather, its cost to libelant in Seattle, the exhibits and proofs show various items for freight paid from the points at which the goods were purchased to Seattle, and for drayage to the wharf, and labor expenses upon the goods prior to shipment, all of which libelant claims entered into and formed a part of the cost of the goods to it, and properly form a part of the value of the cargo.

The freight prepaid by libelant, including wharfage at Seattle of $89.00, was $6,073.47. (See Bill of Lading, one of original exhibits, sent up under stipulation. Rec., p. 886.)

The evidence shows that the cargo was so injured that it was unsalable, and had to be peddled out in order to be sold at any price.

The evidence further shows that because of the damage suffered by its cargo libelant was unable to establish or carry on the business for which the goods were shipped to Nome, and that its business, or rather, its intended business, was broken up and destroyed and had to be abandoned, and the portion of the cargo which reached its destination was so injured that it was practically worthless, except as damaged goods, and could only be sold as damaged goods, far below the market, and for such prices as could be gotten for them as damaged or second hand goods and by hawking them about.

When the matter was in the hands of the adjuster in San Francisco, libelant sent to the adjuster all of the original invoices for the cargo, and when, after that adjustment was completed, it endeavored to have its invoices returned to it, it was informed that many of them had been lost, or destroyed, or mislaid, and could not be found, so libelant then attempted to obtain duplicates of the missing invoices, and was successful in most instances, but in others it was compelled to have Mr. Malloy, who is its secretary, and who was a member of the copartnership which owned the Standard Club in Seattle, make out new invoices in lieu of those from that club which had been sent to San Francisco and were not returned, and in other instances it obtained duplicate invoices from Lane and from Peterson, from whom some of the articles in the cargo had been obtained. To many of these new invoices claimant objected when they were offered in evidence, but libelant insisted, and still insists that they were all admissible.

The bill of lading is in evidence and provides that any adjustment in general average shall be made in accordance with the York-Antwerp Rules of 1890. These Rules are in evidence. (Rec., p. 752.)

The original libel was based upon the general average adjustment made in San Francisco by the adjuster selected by the claimant.

During the progress of the cause the District Court held, in passing upon exceptions to the answers of claimant, that the San Francisco adjustment was not binding upon claimant because it did not appear that claimant had agreed in advance to be bound by it, nor had it accepted it after it was made. (Rec., pp. 54 and 83.)

Both libelant and claimant understood the Court's decision to practically lay that adjustment out of the case, and, with that understanding, on its part at least, the libelant filed amendments to its libel (Rec., p. 86), stating further facts, and praying the Court, if said adjustment should be ignored, to hear all of the evidence and make proper and fair adjustment in general average, itself, of the losses sustained by the sacrifice on that voyage.

The claimant answered the libel and amendments and the cause was referred to the commissioner to take and report the proofs to the Court. This was done at great expense to libelant, because, with its understanding of the Court's decision, it became necessary for it to go over the entire ground covered by the San Francisco adjuster, and more, an dit introduced evidence of everything done from the inception of the design to ship the cargo to Nome down to the final disposition of the remnants of the cargo and the adjustment in San Francisco,

and in fact, almost to the time of the trial in the District Court.

ARGUMENT.

I.

The District Court having held that the San Francisco adjustment was not binding upon the claimant, it is, of course, not binding upon the libelant, and with that understanding of the Court's decision, libelant accepted the decision as the law of the case, and conformed to it accordingly, and at great expense of time, labor and money, has taken the testimony of all witnesses it could find who had any knowledge of the subject in controversy for the purpose of presenting all of the facts to the Court, so far as they could be obtained, so that the Court, upon full consideration, could make a proper adjustment of the loss, and by its decree provide the amount and manner of its payment.

II.

In order to properly adjust the loss and fix and assess the amount to be contributed by each interest in the enterprise, the evidence should show the value of the ship, the amount of the pending freight, the value of the entire cargo at the port of destination, and the amount of the loss.

The Rapid Transit, 52 Fed. Rep., 320.

The evidence supplies all of these necessary items of an adjustment, except the value of the entire cargo.

The vessel, according to the testimony of Capt. R. C. Chilcott, was worth $100,000.00 (Rec. p. 543), and by the testimony of Capt. James Carroll, the same amount

(Rec. p. 542), and by the answer of the claimant in the case of Haldron vs. The S. S. Santa Ana, numbered 1889 and 1895, of the docket of the District Court, to be $110,000.00, and by the decree of that Court in those cases to be $90,000.00. (See original exhibits, sent up as per stipulation. Rec. p. 886.)

So, the vessel was worth anywhere from $90,000.00 to $110,000.00. At all events, it was worth $90,000.00.

The cargo of libelant is shown by the evidence of several witnesses to have been worth, at the port of destination, if it had arrived there sound and uninjured, more than 100 per cent. above its value at Seattle, the port of departure.

The witness Urquhart, as to the items of the cargo concerning the value of which he testified, places the value at Nome at from 80 to 100 per cent. above Seattle prices. (Rec. p. 224.)

The witness Little places it at the same. (Rec. pp. 232-4.)

The witness Richards places it at 80 to 90 per cent. (Rec. pp. 243-4), and gambling appliances at 200 per cent. (Rec. p. 244) above Seattle prices, making an average of 140 per cent above.

The witness Nestor places it at from 50 to 500 per cent. above Seattle prices, making an average of 237.5 per cent. above. (Rec. pp. 249 et sep.)

The witness Dawson places it at from 50 to 450 per cent. above (Rec. pp. 272 et seq.), making an average of 143 per cent. above Seattle prices.

The witness Lane places it at from 100 to 800 per cent. and more (Rec. pp. 304 et seq.), making an average

of 339 per cent. above Seattle prices.

The witness Pope, who was the manager of the Alaska Commercial Company, at Nome, and had, perhaps, a better opportunity to know the prices and values there than most other witnesses, places it at from 100 to 500 per cent. (Rec. pp. 377 et seq.), making an average of 197 per cent. above Seattle prices.

The witness Valentine, who was the manager of J. M. E. Atkinsson & Co., otherwise known as The Nome Trading Co., at Nome, places it at from 75 to 300 per cent. (Rec. pp. 407 et seq.), making an average of 177.6 per cent. above Seattle prices.

The witness Campion, who was the manager of The Seattle Brewing & Malting Co., at Nome, places it at from 100 to 800 per cent. (Rec. pp. 547 et seq.), making an average of 180 per cent. above Seattle prices. This witness based his estimate upon actual sales of the same kind or similar goods, made by him during the time covered by the inquiry.

It is true none of these witnesses pretended to give the Nome value of *every* item of libelant's cargo, but only upon such items as fell within their knowledge, and these values were given of goods arriving in good order; but taking the testimony of all the witnesses together, they, in great measure supplement each other, and from all the testimony a fair and reasonable idea can be obtained of the market value at Nome of all of the cargo, for the values given in evidence are sufficiently general to cover goods of any and every description, for if it is shown that such staple articles as the witnesses testify to as being largely above the values in the States, or at Seattle, had the value at Nome placed upon them by

these witnesses, and there is nothing to contradict their testimony, or in any way discredit it, it is a just conclusion from all the evidence that values at Nome, in all lines, ranged relatively higher than at Seattle or elsewhere in the States.

The average of all the Nome values, as testified to by these witnesses, is 181.6 per cent. above Seattle, or outside values, and this shows the general and uniform increase at Nome over prices in the States for goods of the kind embraced in this cargo.

But libelant, for the purposes of this case, instead of taking 181.6 per cent. above outside prices as the value of its cargo at Nome, if it had arrived sound and in good order, will take a uniform rate of 100 per cent. above cost at Seattle, as giving a fair, reasonable and conservative value of the entire cargo at Nome, the port of destination.

This gives the value of libelant's cargo, at Nome, if it had arrived sound, as $65,538.30, besides freight paid.

Notwithstanding this testimony, which was wholly uncontradicted, the District Court seemed to have passed it all by, and rendered judgment based entirely upon the San Francisco adjustment, saying "The libelant argues for a larger award than obtained by the adjustment, but it does not by its pleadings repudiate the adjustment, and should be content to have a decree for the amount sued for, with interest." (Rec. p. 867.)

It is true the adjustment was not assailed by libelant, but it was by the claimant, and claimant's objections to it were sustained by the Court in its opinion upon exceptions above cited (Rec. pp. 54-5), when it held that the adjustment was not binding upon claimant, unless it had previously agreed to be bound, or had subsequently ac-

cepted it. Certainly if not binding on one party, it was not binding upon the other.

The Court evidently believed that the adjustment had been assailed at some stage of the case by some party to the record, for it proceeds to look into the adjustment and point out some of the mistakes in it and to show where it did not do justice to libelant. (Rec. p. 866.)

Yet it finds the adjustment to have been "fairly and honestly and approximately accurate and just and not unfair to the owners of the ship." (Rec. p. 866.)

But libelant insists that this is not a just conclusion and is not founded on the evidence taken and submitted to the Court, under the influence, and by the authority of, its previous opinion setting the adjustment aside (Rec. pp. 54-5), but that libelant, being compelled to abide by the decision of the Court, was bound to adjust its conduct to that opinion, and amend its libel, and go into proofs at large, and seek a new adjustment by the Court, as it did, without regard to the San Francisco adjustment, and in such circumstances it works a hardship upon the libelant to say that at one time the adjustment is not binding and at another time that it is, and that libelant ought to be satisfied with the amount found to be due by it.

It is not a question of what the libelant "should be content to have," but what under the law and *evidence* it is entitled to.

The Court says libelant did "not by its pleadings repudiate the adjustment," and this seems to be the main reason for its judgment; but libelant submits that in view of the Court's previous ruling, that the adjustment was not binding, and in view of the overwhelming mass

of evidence proving that the adjustment was wrong and unfair to libelant, it was the duty of the Court to consider all of the evidence, ignoring any mere omission in the pleadings and decide the case upon the evidence. In this state of the case, libelant was not required by its pleadings to repudiate the adjustment, for,

"There is no doctrine of mere technical variance in the admiralty * * * * * * * * * * it is the duty of the Court to extract the real case from the whole record and decide accordingly."

"*The Syracuse*," 12 Wall., 167.

"*The Gazelle and Cargo*," 128 U. S., 474.

The whole conduct of the case after the Court's decision that the adjustment was not binding (Rec. pp. 54-5), and the course pursued by both parties, show that the cause was treated as one for an original adjustment by the Court, and, if it was necessary to enable the Court to "extract the real case from the whole record and decide accordingly," to amend the pleadings and set aside the San Francisco adjustment, that will be regarded as having been done, because the case proceeded as if it had been done, and without objection from either party.

To say in the final decision, "the adjustment is binding because the libelant did not assail it in its pleadings," in the light of the previous ruling (Rec. p. 54-5), works a hardship on libelant which ought not to be done, for if libelant had believed, or could have had any reason to believe, that the Court would finally hold the adjustment good, it could have introduced the adjustment in evidence under its original libel and rested secure until claimant impeached it for fraud, accident or mistake, and thus have saved an immense amount of time, labor

and expense; but libelant having, in good faith, obeyed the ruling of the Court and having proved damages largely in excess of the amount found by the adjuster, without objection from Court or opponent, is now certainly entitled to the benefit of whatever the evidence shows its damages to be.

III.

The rule is that general average must be adjudged upon the value of the cargo at the port of destination.

Dixon on Gen. Av. (Ed. of 1867), pp. 171-2.

The Eliza Lines, 102 Fed. Rep., 184.

York-Antwerp Rules of 1890, Rule 17.

14 *Am. & Eng. Encyc. of Law* (2nd Ed.), pp. 989-991.

Bradley vs. Cargo of Lumber, 29 Fed Rep., 648.

Olivari vs. Thames & Mersey Ins. Co., 37 Fed. Rep., 894.

Nat. B'd of Mar. Underwriters vs. Melchers, 45 Fed Rep., 643.

The bill of lading (which is in evidence as libelant's Ex. 1), in the sixth paragraph, expressly provides that general average, if any, shall be adjusted according to the York-Antwerp Rules of 1890, and the 17th of those rules, cited above, provides: "The contribution to a general average shall be made upon the actual value of the property at the termination of the adventure, to which shall be added the amount made good as general average for property sacrificed," etc. (Rec. p. 761.)

And Rule 16th provides: "The amount to be made good as general average for damage or loss of goods sac-

rificed shall be the loss which the owner of the goods has sustained thereby, based on the market values at the date of the arrival of the vessel or at the termination of the adventure." (Rec. pp. 760-1.)

With this rule in mind, the libelant sought by the testimony to show "the market values at the date of the arrival of the vessel and the termination of the adventure, and believes it has done so, so far as it was possible, by human testimony.

IV.

The ship, freight and cargo must all contribute in general average to make good the loss sustained by the sacrifice.

14 Am. & Eng. Encyc. of Law, 2nd Ed., 986.

8 Am. & Eng. Encyc. of Law, 1st Ed., 1305.

This rule is clearly stated in:

Ralli vs. Troop, 157 U. S., 386, L. Ed. 39:742,

And approved in:

The J. P. Donaldson, 167 U. S., 599; L. Ed. 42:292,

And also in:

The Lucaddy, 171 U. S., 187; L. Ed. 43:130.

V.

The ship and freight suffered no damage whatever, and must, therefore, contribute upon their full value. "Freight pending" includes prepaid freight and passage money.

"*The Main,*" 152 U. S., 122; Law Ed. 38:381.

VI.

The value of the saved portion of libelant's cargo, which reached its destination in a damaged condition, can only be certainly ascertained by a knowledge of what such goods in their damaged state would sell for in that market.

14 Am. & Eng. Encyc. of Law, 2nd Ed., p. 992.

Bell vs. Smith, 2 Johns, 98.

1 Parsons on Shipping, 461.

The witnesses all agree that they were unsalable, except as damaged, or second hand, goods, and the evidence fails to show what the sale value of such goods was, except as it may be ascertained from the evidence of the actual sales made of this particular cargo, or portions of it.

1 Parsons on Shipping, 461.

The evidence is that the cargo was so damaged that it was unsalable and had to be hawked about, and persons induced by commissions to aid in working it off, and that the gross amount realized from its sale, after the most diligent effort, was only $21,000.00. (Rec. p. 579.)

And the cost and expenses of making the sales was $6,000.00. (Rec. p. 579.)

So that, out of the entire cargo libelant only realized $15,000.00, net.

Then, the amount of the cargo to be contributed for is the difference between the sound value at the port of destination, if it had arrived uninjured, and the actual value of the saved portion in its damaged condition at that port.

14 Am. & Eng. Encyc. of Law, 2nd Ed., 991.

Carver on Carriage by Sea, Sec. 419.

York-Antwerp Rules of 1890, Rule 16.

The cargo cost at Seattle, including the items of draying, labor, storage, etc., as shown by the evidence, $32,769.15; freight prepaid to be added, $6,073.47. The Nome value, at a uniform increase of 100 per cent, which, as we have shown, the evidence abundantly justifies, with prepaid freight similarly increased, was $77,684.30.

Taking this as the value at the port of destination, and deducting the amount realized from the sales less the cost and expenses of making the sales, and the damage is $62,684.30.

Taking the cargo at $77,684.30, the ship at $100,000, and the pending freight at $3,427.72, makes a total value upon which to estimate the contributory share of $181,112.02, and the rate per cent. is 34.6107. At this rate the cargo should contribute $26,887.08, and the ship and freight should pay $35,797.22.

But if the estimates made by the several witnesses are to control, the damage will be the amount of those estimates, or of the average of all of them.

VII.

For the purpose of general average, the ship is bound to the cargo, and the cargo to the ship, and the sacrifice must be made good in proportion to the value of each interest at risk.

Schr. Freeman vs. Buckingham, 18 How., 182, Law Ed. 15:341.

Dupont vs. Vance, 19 How., 169, L. Ed. 15:586.

Ralli vs. Troop, 157 U. S., 386, L. Ed. 39:742.

VIII.

The destruction or injury of the cargo by water or steam poured into the vessel to extinguish the fire is a sacrifice which must be made good in general average.

The Roanoke, 59 Fed. Rep., 161.

The Rapid Transit, 52 Fed. Rep., 320.

Heye vs. North German Lloyd, 33 Fed. Rep., 60.

The Roanoke, 46 Fed. Rep., 297.

Nelson vs. Belmont, 5 Duer, 310.

Nimick vs. Holmes, 25 Pa., 366.

14 Am. & Eng. Encyc. of Law, 2nd Ed., 973.

York-Antwerp Rules of 1890, Rule 3.

IX.

The only disputed question of fact in the case is, whether the libelant agreed that the survey or appraisement made by Gollin was correct, and showed the total amount of damage the cargo had sustained. The District Court held that the attempt to plead that survey, or so-called adjustment, was not a good plea, and no defense to the libel. (Rec. p. 60.) That the most that could be claimed for that survey and the alleged assent thereto by libelant, would be that it was an admission by libelant that that survey correctly stated the amount of damage the cargo had sustained. That it was not an estoppel, and could only be evidence of an admission. (Rec. pp. 60-1.)

Gollin alone testifies to such agreement. W. D. Wood says he knows nothing of any such agreement, but supposed the examination which he employed Gollin to make had been satisfactory, because he had heard no

complaint of it; but does not testify that if it was unsatisfactory complaint should be made to him.

The testimony of Gollin is contradicted by the testimony of Malloy, of Peterson, of Lane, and of Gordon, who were all present at some time during the progress of Gollin's survey, and they all agree that there was no agreement made between Gollin and Malloy, except as to a few items which were totally destroyed, and which Gollin stated were worthless, and to this statement Malloy agreed. But that is the only agreement made. Those who were present during the survey testify that Malloy objected all the time to the estimate of damage Gollin was placing upon the goods he examined.

They all agree that Gollin only examined a part of the cargo, and refused to examine the rest. Gollin tries to account for his partial examination by saying that he only examined such goods as were laid out for him, and that as to the others, Malloy agreed to waive the damage to them. This is contradicted by Malloy and by the other witnesses who were present. Gollin's examination is shown to be very cursory, superficial and hastily made. He would only work a short time each day at it, and finally, to induce him to hurry it up and finish it properly and within a reasonable time, Malloy gave him $100.00. Gollin says that he understood this $100.00 to be a bribe, but it will be observed that he kept it, although he tried to pretend that it was "tainted money."

Gollin gave Malloy and the other witnesses to understand that he was examining for the insurance companies, and, believing that to be true, and being dissatisfied with the very partial and incomplete examination made by

Gollin, Malloy immediately made another and more careful and thorough examination, and on this last examination he based his proofs of loss to the insurance companies.

Gollin's statement is further shown to be improbable, and, therefore untrue, by the fact that this cargo, which was worth more than $50,000.00, if it had reached its destination uninjured, and upon which more than $5,900.00 freight had been paid, and which had been shipped to Nome for the purpose of establishing and carrying on a large and extensive business, was so far damaged and ruined as to be wholly unsalable, except as damaged goods, or "old junk," as some of the witnesses call it, and which, after diligent effort, sold for only $21,000.00, gross, and because of such damage libelant was compelled to and did give up and abandon its business; yet Gollin says, in the face of all this, that Malloy agreed that his estimate of $3,617.04 was all the damage that cargo had sustained.

And appellant attempted to make the District Court believe, upon the unsupported testimony of Gollin, that libelant admitted this enormously valuable cargo, almost totally ruined, damaged beyond any hope of repair, was injured only to the extent of $3,617.04, and that, too, without any promise, or agreement, or assurance, that even that beggardly sum would be paid by any one, at any time. The testimony of Gollin carries upon its face its own refutation by its inherent improbability, and it is contradicted by all the other evidence in the case and by the physical facts surrounding the case.

We insist that in the light of all the testimony Gollin's testimony is not sufficient to amount to an admission

on the part of libelant as to the extent of the damage.

But if the Court should believe that Gollin's testimony is sufficient evidence of an admission by libelant that it was only damaged in the amount estimated by him, then the evidence all shows that such admission was made under a mistake of fact and in ignorance of the truth as to the extent of the damage the cargo had sustained, and is, therefore, not binding upon libelant, but is open to explanation and to be utterly disproved, as it has been by the great mass of the testimony, and as shown by the truth, as afterwards ascertained upon a more thorough and careful examination of the cargo and by the sales actually made.

X.

Appellant, seizing upon a remark in the opinion of the District Court in passing upon the exceptions to the answer, has endeavored, in the cross-examination of libelant's witnesses to show that certain gambling appliances, forming a part of libelant's cargo, could only be used for gambling purposes, and argued that for that reason they should not be contributed for in general average.

This argument, we respectfully submit, is not sound. The test as to whether goods shall be contributed for in general average does not depend upon whether the goods could or could not be used for an unlawful purpose, at some other time, and not at the time of the sacrifice; but is determined solely by the decision of the question: Would such goods be compelled to pay, or contribute in general average, to make good the loss sustained by the other cargo and the ship, if such goods had been saved uninjured?

The only possible ground upon which it could be contended that these goods should not be contributed for is that they were contraband at the time of the sacrifice. But that they were not then contraband is shown by the simple definition of the word. The Century Dictionary defines contraband as follows: "Contra," "against," "ban," "the law or proclamation," and that it applies to (1) "illegal or prohibited traffic;" (2) "anything by law prohibited to be imported or exported," Cent. Dict., p. 1231. Now, under the facts of this case, it is impossible that these gambling appliances could have been contraband,, for the very sufficient reason that there was no law or proclamation making them contraband at the time of the sacrifice. Nor was there any law of Congress or of the State of Washington making the possession or ownership of gambling appliances unlawful; nor was there any proclamation from any authority declaring them to be such. Gambling appliances become unlawful by their unlawful use, or fall under the ban by their use for gambling. There is no pretense that any of those in this cargo were used for gambling at the time of the sacrifice, nor at any other time, so as to make them fall under the designation of contraband.

It is the *use*, not the existence or possession of gambling apparatus, that makes them contraband.

Gulf. C. & S. Ry. Co. vs. Johnson, 71 Tex., 619; 1 L. R. A., 730.

U. S. vs. Smith, 27 Fed. Cases, p. 1155.

14 Am. & Eng. Encyc. of Law, 2nd Ed., 683, par. 4.

1 Suth. on Dam., 3rd Ed., p. 14, and note.

In Johnson's case (71 Tex.) recovery was allowed for damages to gambling tools resulting from injury to

a building, and the Court holds that unless the law is being violated *at the time of injury,* the plaintiff is entitled to recover.

Neither gambling nor the possession of gambling tools was an offense at common law, unless gambling was carried on in such a public manner as to constitute a public nuisance.

14 *Am. & Eng. Encyc. of Law,* 2nd Ed., 666.

U. S. vs. Willis, 28 Fed. Caess, p. 698.

The "keeping," etc., of gambling tools must be for the purpose of obtaining bettors. (14 Am. & Eng. Encyc. of Law, 2nd Ed., 711 and notes.) This confirms our position, if any confirmation were needed, that it is the *use,* and not the ownership of gambling appliances which renders them obnoxious to the law, and only then when there is a statute so declaring.

Therefore, these appliances could not be held, as a matter of law, to be of no value, because unlawful, for we have shown that they were not unlawful in the situation in which they were placed at the time of their injury.

As a matter of fact, they are shown by the evidence to have been in great demand at their destination, and of immense value. (Rec. pp. 281-2 et seq., and pp. 233-4—312-13.)

These goods having been lawful at the time of the sacrifice, and having a lawful status of actual value, and being a part of the joint enterprise of that voyage, including in the enterprise the ship, freight and cargo, and being damaged by the sacrifice made to save the balance of the enterprise, must be contributed for the same as other lawful cargo.

XI.

Appellant has sought to meet the evidence of libelant only upon the amount of the damage to the barrel goods. To do this, it has shown by the witness Gottstein and by a table identified by him, the amount of the 'outage'' or ''wantage'' there would be in whiskies in barrels during certain periods by natural absorption and evaporation; and by the witness O'Reilly that he bought some of the whiskey from libelant at Nome which was in this cargo, and that the barrels were short in their contents. But O'Reilly testifies that the barrels which he bought were short a greater amount than the natural outage would allow, and that he made complaint to libelant of such shortage, and that libelant made it good to him by paying him money. (Rec. p. 858.)

The testimony of Gottstein and the table introduced by the appellant are no more than merely a statement of the terms of the statute which provides that spirits in bonded warehouses shall be guaged and stamped when put in bond, and reguaged and again stamped when they are taken out of bond and the taxes paid, and that upon such reguaging there may be allowed so much for absorption and evaporation within certain definite periods, and no more, and that the taxes shall be paid according to such reguage. (28 Stat. 564, Sec. 50; 30 Stat. 1349; 32 Stat. 770.

In short, it was to establish the maximum limit of evaporation which would be allowed as a basis of taxation.

This reguaging was to be made upon the request of the owner, if made within a certain time, and if no request was made and no reguage had, then the taxes were

required to be paid upon the contents of the barrels as shown by the first guage. 1d.

The testimony shows that the barreled goods in this cargo were reguaged, or double-stamped goods, and the exhibits show when they were released from bond and the number of gallons they then contained. The testimony of Mr. Messersmith shows that the natural outage from the time these barrels were taken out of bond, at the date of their purchase by libelant, as shown by the invoices, to the time of their landing at Nome would be so trifling as to be hardly appreciable, and that under no circumstances could such natural outage, during such time, amount to the shortage that was found in the barrels at Nome, as shown by all the evidence.

So, it seems clear that this outage, or shortage, as it was found to exist at Nome, of from 20 to 30 per cent. of the contents of the barrels, as shown by the guager's lists, was more than the natural outage, and that it was caused by the superheating by the steam to which the cargo was subjected in the efforts to extinguish the fire in the hold of the vessel, for it was proven that the barrels showed evidence of leakage from the bungs and where the liquor had escaped and run down the sides of the barrels. (Rec. pp. 458, 515, 580, 582, 660.)

The evidence also showed that the case goods, i. e., liquors in bottles enclosed in cases, had been so overheated as to cause them to escape from the bottles, sometimes through the corks, for the bottles were found sound with the corks in place, but the wine or liquor in some cases entirely gone and in others partly gone, and what was still in the bottles ruined, and in other instances the neck or bottom of the bottle was found

broken and the contents gone. (Rec. pp. 342, 586, 445, 501, 513-14.)

XII.

The master of the ship having failed to take general average bonds or other security for the contributory share, due from the remainder of the cargo, the ship becomes liable and must contribute for that cargo.

Crooks vs. Allan, 5 Q. B. Div. (1879), 38.

1 Parson's Mar. Law, 330.

Heye vs. North German Lloyd, 33 Fed. Rep., 60.

The Allianca, 64 Fed. Rep., 871.

XIII.

Libelant is entitled to recover interest on the amount of the contribution due from the ship.

The Wanata, 95 U. S., 600, L. Ed. 24:461.

The Southwark, 129 Fed. Rep., 171.

The Favorite, 12 Fed., Rep., 213.

The George W. Robey, 111 Fed., Rep., 601.

Especially since the appellant has litigated the right of the libelant for so many years, and with such stubborn persistency, when the right of the libelant to recover has been manifest from the very beginning, even as shown by appellant's main witness, Gollin, for, by his testimony it is shown that libelant was damaged, at least, to the extent of $3,617.04, and yet appellant has never paid nor offered to pay that amount, or any part of it.

It selected its own adjuster in San Francisco, and then refused to stand by what that adjuster did. Prior to that, at Nome, it selected its own surveyor, Gollin, and has refused and still refuses to pay the ridiculous

amount which he found to be due to libelant. Under these circumstances, the appellant does not stand in an enviable light before the Court in an equitable proceeding to adjust a sacrifice suffered by one for the good of all.

XIV.

As to the manner and basis of the adjustment, there may be several bases upon which it might be made under the evidence, but libelant claims that the only proper one is:

Value of ship	$100,000.00
Pending freight	3,427.72
Value of cargo	65,538.30
Freight prepaid by libelant Doubled	12,146.00
Total value at risk	$181,112.02
The net amount of sales	$ 15,000.00

The loss, the difference between the Nome value of cargo and freight, $77,684.30, and the net amount of sales, $15,000.00, making $62,684.30.

The rate per cent. upon which the contribution must be calculated is obtained by dividing the loss by the total value at risk, which gives the rate of 34.6107 per cent. Multiplying the value of the cargo on one hand, and the ship and freight on the other, by this rate, gives the contributory shares as follows:

Cargo	$ 26,887.08
Ship and freight	35,797.22
	$ 62,684.30 total

loss and the amount made good.

But if the value of the ship is only.$ 90,000.00
Pending freight ..... 3,427.72 and the prepaid freight should not be added to the value of the cargo, the calculation would be as follows:

Ship	$ 90,000.00
Freight	3,427.72
Cargo	65,538.30
Making the total value at risk..	$158,966.02

and if the loss is the value of the cargo, less the net amount of the sales, the loss will be $65,538.30, less $15,000.00, being $50,538.30. This loss divided by the total value will give 31.7950 per cent. as the rate upon which the contributory shares should be calculated; by this the cargo should pay $20,832.96, and the ship and freight should pay $29,705.34, making up the loss of $50,538.30.

Or, if this be not proper, then take the same values of ship, freight and cargo:

Ship	$ 90,000.00
Freight	3,427.72
Cargo	65,538.30
Total at risk	$158,966.02

and deducting the gross amount realized from the sales, from the value of the cargo, and taking the remainder as the loss, the loss will be $44,538.30; this divided by the total value, $158,966.02, will give 28.0170 per cent. as the rate upon which the contribution should be calculated, and will result as follows:

Cargo to pay	$ 18,362.76
Ship and freight to pay.....	26,175.54
Making the total	$ 44,538.30

the amount of the loss.

So, libelant contends that taking any view of the facts of this case, even the most unfavorable to it, and most favorable to the appellant, there must be a decree for the libelant for a sum in excess of $26,000.00.

But libelant says that it is entitled to have its damages estimated in accordance with the well settled rules governing the adjustment of losses in general average, and based upon a fair view of the evidence, and when so estimated it is entitled to recover under the first example above given, namely: $35,797.22.

XV.

As stated above, libelant not having been favored with appellant's brief on this appeal, it is in the dark as to what position appellant may take or what argument it may make here, beyond what may be gathered from the assignment of errors; so, libelant, in this dilemma, can only assume that appellant will pursue the same line of argument, if it makes an argument in this Court, that it pursued in the District Court.

Upon this assumption libelant will now attempt to answer that argument.

In the District Court appellant contended that the amount of the damages found by Gollin on his survey, made at Nome, should be taken as conclusive upon the parties to this action, and attempted to extract from the evidence an agreement on the part of libelant that that survey showed the true extent of the damage sustained by libelant's cargo by the sacrifice made to save the ship and cargo.

This contention is abundantly answered by the opinion of the District Court, in this case, in its ruling on

exceptions to the answer, to the effect that the alleged agreement, if made (which, however, the evidence shows was not made), was not conclusive, but was, at most, only an admission. (Rec. pp. 55-56-83.) That decision is well supported by authority. If such an agreement had been made, under the circumstances, it would be analogous to, and could amount to no more than, a demand by libelant for the amount of its damages, in a proof of loss, if made to an insurance company under its policy, and in such a case the law is: "The assured is not estopped from recovering a larger amount by the fact that his statement of demand, made after proof of loss, is less in amount than that to which he is entitled, but he may recover the larger amount, if a settlement is not made in pursuance of such statement."

4 Joyce on Ins., Sec. 3454, p. 3336.

American Ins. Co. vs. Griswold, 14 Wend., 399.

If there had been any such agreement, it would not be of any validity, for there was no consideration for it. It would be like the voluntary demand made on the insurance company, in the case last above cited. It was voluntary, without consideration, and, until accepted and performed by the owner of the ship, could be abandoned or rescinded by libelant. It was, as the District Court held, no more than an admission by libelant, even if Gollin's utterly improbable testimony should be believed in its entirety.

Appellant further contended that "libelant's goods were not released until after the goods had been inspected and the damages agreed upon." Now, there is not one particle of evidence to support this statement. It is evidently born out of the desire of appellant to es-

cape the effect of the ruling of the District Court, and to manufacture some semblance of a consideration to support the alleged agreement. Claimant must go outside the evidence to do this, for no witness testified that the goods were released after the survey by Gollin. Judge Wood does not so testify. He said he considered the goods constructively in his possession, although delivered to libelant without condition, except that no rights were waived, and that in his opinion they were in his possession until the damages were ascertained; but he does not say that libelant, or any one else in its behalf, so understood it, or accepted them on any such terms. The evidence is that the cargo was delivered *unconditionally,* except that no rights were waived thereby, which could exist consistent with such delivery, either of libelant, or the ship, or any one else. Neither party seemed to have a clear idea what their respective rights were, further than that libelant was entitled to the possession of its goods, but whatever their rights were, or should turn out to be, they were not waived.

Neither Judge Wood nor the ship had the right to refuse to deliver the goods to libelant until the damages should be ascertained or agreed upon; but libelant was entitled to their immediate possession unless the ship demanded a general average bond, or other security, to pay its contributory share of any assessment that might be made, but this was not demanded nor expected, for it was clear to all that libelant would have nothing to pay. The freight had been prepaid, and there was no claim to hold the goods on that account. The ship had not been injured by the sacrifice, but libelant's goods had been, and it was clear to every one that the payment would have to be made *to* libelant, and not *by* it.

Judge Wood seemed to have a vague idea that it was his duty to have the amount of the damage ascertained by a survey, and for that purpose he employed Gollin. And he may have thought that was the best way to lay the basis of a general average adjustment, and he may have said as much to Malloy; but of this his evidence is not clear, and Malloy is positive that he did not; but if it should be believed that he did, and that Malloy had forgotten, it is certain that he did not understand what was necessary to be done to make that adjustment, and it is more certain that he did not make Malloy understand what he meant by a "general average" adjustment. So, although he might have intended to inform Malloy that there must be an adjustment in general average, he did not succeed in doing it, and their minds never met on that proposition. Malloy says he never heard of "general average," and as he, Malloy, made no claim against the ship, nor Judge Wood, nor the transportation company, but was looking entirely to his insurance for indemnity, the statement of Judge Wood, if he made it to Malloy, that it was a general average loss, and there would have to be an adjustment, would not, and did not, convey to Malloy's understanding any idea of any suit, action or proceeding that he had ever heard of, for the recovery of damages. It was all Greek to him; and this is not surprising when it is remembered that there is not one lawyer in a hundred who would understand what was meant by a general average adjustment, unless he was specially engaged in admiralty or marine insurance litigation.

This being true, how could a mere layman be expected to understand the intricacies of this very abstruse branch of the law?

Appellant, after arguing itself into the belief that libelant had agreed with Gollin on the amount of its damages, set up an imaginary estoppel, and said: "The ship acted on his agreement. The ship lost the right to preserve evidence of the damages, etc."

There is not a syllable of evidence to sustain this statement. It is not shown that the ship, or any one in its behalf, did, or omitted to do, anything whatever, because of such alleged agreement. Judge Wood testified that he knew of no such agreement; that he understood the object of the survey was to reach an agreement, and, having heard nothing to the contrary, he assumed that it was made; but he did not say that he acted on that "assumption," that he did, or omitted to do, anything that he would otherwise have done if he had known that no agreement had been made. Now, Gollin was his own employee. He said that Gollin never informed him of the agreement. He said Malloy never informed him of any agreement. Both Gollin and Malloy remained in Nome within a few blocks of him as long as Judge Wood did, and if there was to be an agreement, or if a failure to agree was to be so important to the ship, as appellant would have the Court believe, Gollin certainly understood its importance, for he claims to have had 25 years' experience as an adjuster of such losses; why did not he inform Judge Wood? And since Judge Wood said he did not, why did not Judge Wood take some step to ascertain whether any agreement had been made? Judge Wood said the reason he *assumed* that an agreement had been made was, that in cases of other cargo owners failing to agree with Gollin, the matter was referred to him, and when he informed such owners that unless they agreed their goods would be held until the damage could

be ascertained, and that under this threat they agreed. But no such pressure was brought to bear upon libelant. Its goods were not withheld from it, but they were delivered before the survey was made, and no demand or effort was ever made to regain the possession of them by Judge Wood. This effectually disposes of appellant's assertion that the ship would be injured by failure to enforce the pretended agreement.

Appellant cited authority to the effect that it is competent for the parties to agree, and thus change their rights in a general average adjustment.

14 Am. & Eng. Encyc. of Law, 2d. Ed. 997.

But the very next section, on the same page, qualifies that statement as follows: "But in exempting one from liability to contribute to a general average (which the ship is claiming here, pro tanto,) it seems that the Courts are slow to enforce or import such contracts between the parties. Such exemptions can only be made *in clear and express terms.*"

Id.

Now, if the ship acted on this (alleged) agreement, there should be something in the evidence to show what the ship did, or omitted to do. What did it do, or omit? The evidence fails utterly to show. Did it withhold the goods of other owners until this pretended agreement was made? No witness says so. Judge Wood does not say so. Gollin does not so testify.

It does not appear whether the goods of other shippers were delivered before or after libelant's goods were delivered.

It is a fair inference from the evidence that the other

goods were delivered first, and that Gollin examined them before he examined libelant's goods; at all events, they were delivered before libelant's goods were examined, and before there was any opportunity to make the pretended agreement, for it is in evidence that Gollin was so busy examining other goods before he commenced to examine libelant's goods, that he could not examine libelant's goods for several days, and that, to induce him to begin the examination it was necessary for Malloy to pay him $100.00, (which the virtuous Gollin says he took as a bribe) although he was employed by Judge Wood at a salary of $50.00 a day. Now, this was long before he examined libelant's goods, or completed that examination, and of course, long before the alleged agreement could possibly have been made. If this is true, the agreement, if any had been made, could not have had any effect or influence upon the conduct of Judge Wood or the ship in delivering or retaining other goods.

Appellant contended that the ship lost the opportunity, by this alleged agreement, to examine libelant's goods. This statement wholly fails to find support in the evidence. Gollin did not report the agreement. Malloy did not report the agreement. Judge Wood had no information that any agreement had been made, which should so seriously, as now claimed, affect the rights of the ship. Then, to all intents and purposes, matters stood as they stood before any thought of an agreement was entertained by anybody. If the ship could gain any advantage or benefit by examining libelant's goods, why was not that examination made? The goods were there. Judge Wood knew where they were, and also knew that libelant was trying to dispose of them. Judge Wood says they were constructively in his possession. If it was so

important that they be examined again by, or on behalf of the ship (for it will be remembered that Judge Wood testified that the examination which was made was for the ship), why were they not again examined?

The fact is that this is an after thought, born of the desperate plight appellant finds itself in in this case; it is a mere grasping at straws, by appellant, to show an imaginary consideration for a visionary agreement that exists only in the fertile imagination of its swift witness, Gollin, and which is now pushing its ghostly visage into this case to bolster up the very weak attempt appellant is making to avoid the payment of its just contributory share of the sacrifice of libelant's goods for the salvation of all concerned.

If the law is that such agreements must be made "in clear and express terms," the evidence wholly fails to show any such agreement. It rests solely upon the unsupported, but abundantly contradicted, statement of Gollin. If Malloy agreed to Gollin's survey, why did not Gollin have Malloy sign an acceptance, or "O. K." his report, and deliver it to Judge Wood? It would have been an easy matter, if true, to have had Malloy note at the foot of the report his agreement to its correctness. But, this was not done, and no report was made to Judge Wood concerning it.

The story of an agreement is made of whole cloth, by Gollin, and if not corruptly done, it was done to avoid censure for making such a slovenly and imperfect and careless examination, and survey.

XVI.

Appellant next asserted that the greater part of the damage to libelant's goods was done by the fire, and

that there is no basis for a general average adjustment, and it industriously culls from the testimony a few general expressions of the witnesses that the cargo was "all burned up;" was "all burned and scorched by the heat and fire," but it studiously avoids quoting or citing that part of the testimony of the witnesses that goes into the particulars. Much is made of the statement of L'Abbe, that the cargo was "all burned up," but no notice is taken of L'Abbe's statement that he only saw the cargo as it was landed, and made no examination of it. All the evidence shows that the fire was a slow smouldering fire, small in extent, confined below the tightly battened hatches, without vent, air or draft, and with no chance to burn or burst into flame. In this confined place and condition it might have smouldered for weeks without doing one-half the damage that was done by the water and steam which was poured upon it, or into the hold in an effort to put it out. Appellant said it burned a whole day before the steam was turned in, and it based this extraordinary assertion on what Peterson said on page 467 of the record, after he had been coaxed and wheedled by counsel, as follows:

Q. "You spoke yesterday in your direct examination of the fact that the first attempt to put out the fire was not successful?"

A. "Yes."

Q. "After that time—the first attempt—they opened up the hatches again and found the fire still burning?"

A. "Yes sir."

Q. "Now, how long had the fire been burning up to that time?"

A. "Well, I don't know, exactly, but I understood—

my recollection is, that the fire was discovered the second day of June, and the fourth the fire was out."

Q. "How long were they engaged in making the first attempt that you spoke of to put the fire out?"

A. "I can't say how many hours it took—I can't say."

Q. "As long as a day?"

A. "Well, I guess it did—pretty near—seemed to me about that."

In this appellant wholly ignores what the same witness said on page 437 of the record, where he said:

Q. "How long did the fire burn?"

A. "Well, that I couldn't say, exactly, because my recollection is it was the second day of June that they found it, and that they didn't get it out at first—well, *they had steam on it*, then they opened up the hatches and thought it was out, but found it still burning, and battened down the hatches again, and about the fourth, I think, the fire was extinguished."

This shows that "*they had steam on it*," as soon as it was discovered, on the first day. This also accords with Malloy's testimony where he says that they made three separate efforts to extinguish the fire with water and steam, p. 565 of the record. On that page Malloy says: they put water in the hold and steam at 200 pounds pressure, on June 2d, the day the fire was discovered, kept this up for six to eight hours, then opened the hatches, put them back and forced steam in for probably six hours more, that was on June 3d, and on June 4th forced steam in again for five or six hours, and also put in two or three feet of salt water. (Record p. 565.)

Now, without the aid of this positive testimony, that

efforts with water and steam were made, as soon as the fire was discovered, to put it out, it is preposterous to assert that the captain would allow the fire to burn, after discovery, for a whole day without trying to put it out. This would be to accuse the captain of a serious and criminal neglect of duty.

It is worthy of remark, in this connection, that it is very strange that the appellant did not call the captain of the ship, its own employee, who knew more of the origin and extent of the fire and the damage done by it than any one else, and what efforts were made to put it out, and when they were made. It is also remarkable that it called none of the other officers or crew of the vessel, who helped to extinguish it.

And more remarkable still, that appellant did not offer in evidence the Marine Protest made by the captain, giving the origin and extent of the fire. It was the duty of the captain to make to the owner a protest, and the presumption is that he did his duty in that regard.

The presumption arising from the suppression of evidence, or the failure to produce it, by calling those witnesses and offering that protest, should be indulged against the appellant in this case, in this particular, that if it had been produced, it would have been against appellant.

Kirby vs. Talmadge, 160 U. S. 379,

Jonathan Mills Co. vs. Whitehurst, 72 Fed. Rep. 502,

Clifton vs. U. S., 4 How. 242,

U. P. Ry. Co. vs. Botsford, 141 U. S. 255,

Runkle vs. Burnham, 153 U. S. 226,

In re Hussman, 12 Fed. Cases, 1076,

U. S. vs. Chaffee, 25 Fed. Cases, 388.

The evidence shows that there was but little fire. T. J. Considine says, there was very little fire, (Rec. p. 434). Judge Wood says, "A few of the packages were actually burned by the fire, *but not many.*" (Rec. p. 769.) Malloy says, "the fire was not very extensive." (Rec. p. 569.)

It is also clear from the testimony, and from all the circumstances, that when the witnesses say the damage was done by "heat," they mean the heat caused by the steam, and not by the fire, for we have seen that there was very little fire, and an abundance of steam poured into the hold for from 14 to 18 hours or longer.

XVII.

Libelant contends that the articles "scorched" or "blistered" if they were also injured by water or steam, are not to be classed as particular average, for the York-Antwerp Rule, 111 only excludes from general average such articles of the cargo "as have been on fire," and this has been held to mean "touched" by the fire.

14 Am. & Eng. Encyc. of Law, 2d Ed. 973, and note. And "touched" is defined by the Century Dictionary, (p. 6400,) "to be in contact with." "to be in physical contact with," etc.

Now, if nothing is excluded from general average except such packages as "have been on fire—touched by the fire—been in physical contact with the fire," then packages that were merely "scorched" or "blistered," would not be considered as having "been on fire," for the scorching or blistering might be done by radiated heat, without the fire having touched or been in physical

contact with the packages, especially is this true, if the greater damage was done by water and steam, as is true in this case. The reason given by the books for excluding packages which "have been on fire," that they would have been consumed by the fire if water and steam had not been poured on them, does not rationally apply to packages scorched or blistered by radiated heat. But however this may be, the articles of the cargo that had "been on fire," or "scorched" or "blistered," constitute a very small part of the cargo, and if they should all be charged to particular average, and excluded from this adjustment the great bulk of the cargo will have to be contributed for in general average, because of the damage done by water and steam and steam heat. Every article in any manner affected by the fire is set forth, with reference to the pages of the testimony in a list which is made a part of this brief, and the testimony there referred to will enable the Court to readily determine what articles of the cargo should be excluded from this adjustment, as falling under the designation of particular average, and to segregate them from the great bulk of the cargo subject to general average.

XVIII.

Libelant submits that the case of the *Reliance Ins. Co. vs. N. Y. Mail S. S. Co.*, 70 Fed. Rep. 262, and 77 Id. 317, relied upon by appellant in the District Court, is not an authority for appellant, for in that case there was no pretense that the tobacco had been injured by the steam; but the contention was that the steam had forced the *smoke* through the tobacco and thus injured it.

XIX.

Appellant next asserted that there were no market prices at Nome at the time the Santa Ana arrived there in June and July, 1900, and insisted therefore, that the cost prices of the cargo should be taken as their value. It quoted the statement of the witness Pope, that it was "his Christianlike policy to charge all the traffic would bear" as evidence that there were not market prices at Nome at that time. Now, we insist that this remark does not prove what is claimed for it, for it is common knowledge, within every one's experience and observation, that every merchant, everwhere "charges all the traffic will bear." That is the only way in which prices are made, or ascertained. If the merchant puts his goods on the market, or on his shelves or counters, or in his store, and offers them to the public at certain prices, and finds no buyers, he knows that he has "charged more than the traffic will bear," but if he finds buyers at such prices, he knows the traffic will bear such prices, and thus his market price is made, and established. It is, of course, unnecessary to suggest to this Court that what the witness meant was that it was his policy to sell his goods for the highest price he could safely charge and do business, or for such prices as the demand in that market would reasonably justify and yield a profit. Appellant also cited the deposition of La Boyteaux to prove that there were not market prices at Nome; but Mr. La Boyteaux does not so testify, he says, in effect, that he could get no satisfactory evidence of the Nome prices, and he therefore arbitrarily added 15 per cent to the cost price. It is true Mr. La Boyteaux did not have evidence of the market prices at Nome, and to that extent he was embarrassed in making his adjustment; but this Court has

evidence of the market prices at Nome at that time, in abundance, and of the best and most reliable character in the testimony of Mr. Pope, the manager of the Alaska Commercial Company, and of Mr. Valentine, then the manager of the Nome Trading Co., now County Surveyor of King County, Washington; those companies being two of the largest merchants in Nome at that time; of Mr. Dawson, the largest liquor dealer there, and of a number of other prominent and reliable merchants who were actively in business in Nome at the time covered by this inquiry, and all of whom give the market prices there. Mr. Campion was so careful and so anxious to be right, that he confined his testimony to actual sales made by him there at that time and constantly referred to his book of daily sales for the data.

Appellant said there can be no market price when the witnesses give the prices at from 80 to 500 per cent. above Seattle, or cost prices. This is an unfair statement of the testimony. No witness stated that any article was worth "from 80 to 500 per cent above cost price." The truth is, that nearly all of the witnesses testified that some articles were worth 80 per cent. and other articles 500 per cent. above Seattle prices, for instance, Mr. Urquhart says whisky, cigars, etc., were worth from 80 to 100 per cent over cost outside. (Rec. p. 224.) Mr. Nestor says lumber was worth $125.00 per thousand, (Rec. p. 250.) Other witnesses say lumber cost in Seattle $22.50 to $25.00 per thousand. If it was worth $125.00 per thousand in Nome, that would be 500 per cent above Seattle prices. Mr. Campion says lumber was worth from $150.00 to $200.00 per thousand, (Rec. p. 548.) Whiskies, which the exhibits show cost $2.35 to $2.50 per gallon were worth $5.00 and $6.00 per gallon, (Rec. p.

550), and Old Crow whisky, (Exhibit 53) was worth $7.50 per gallon, (Rec. p. 551), and beer which cost $9.15 per barrel in Seattle, was worth from $25.00 to $30.00, (Rec. p. 551) per barrel there at that time, being 250 to 300 per cent above Seattle prices. We cite these as a fair sample of all the testimony to show how reckless appellant was in its assertion.

XX.

Appellant in the face of the positive testimony, says that a considerable portion of libelant's cargo "was bought from themselves, under the name of the Standard Club, and what the cost was does not appear." Now, the libelant is a corporation, and the Standard Club was a partnership (Rec. p. 676-7) and the goods obtained from that Club were bought and paid for (Rec. p. 677), and the items and prices paid for these articles are shown in the exhibits in evidence, and are identified by the witness Malloy, and his testimony is no where contradicted. Appellant evidently wants the Court to hold that because Malloy was a member of the corporation and also a member of the partnership, that fact impeaches him and renders him unworthy of belief. If appellant did not think Malloy's testimony worthy of belief, why did it not offer some evidence to contradict it, or why did it not impeach him?

XXI.

Appellant said the item of $6000.00, expenses incurred in selling the damaged cargo ought not to be deducted from the gross amount of sales, for, it says, it (libelant) would have been put to the expense of the sale in any event. In reply to this we say that if the cargo had arrived sound, and libelant had put it on the market in

the usual course of business, it would, of course, have had to pay the expenses of such sales, but it would also have had the benefit of the profits arising from the sale of sound merchantable, salable goods, in a market where the demand for such goods was great and the profits enormous. But that has nothing to do with this case. This is a case where goods are damaged by an act of the master of the ship sacrificing libelant's goods to save an entire valuable adventure, including ship, passengers, crew and cargo from a common peril, and such goods when landed are so damaged as not to be marketable or salable in the ordinary way, in the usual course of business, and extraordinary means and efforts are required to be taken and adopted to realize anything from them and thus reduce the loss, and when expenses are incurred in so disposing of such goods such expenses are the proper subject of general average. If the goods had been sold at auction, after being landed, the expenses of the sales would be deducted from the gross amount received to ascertain their net value, in their damaged condition, for the purpose of contribution.

4 Joyce on Ins., Sec. 3452.

Muir vs. U. S. Ins. Co., 1 Caines, (N. Y.), 54.

The reason for allowing such expenses is stronger, it seems to us, in a case like this, where the owner of the goods has made an earnest and honest effort to realize more on the goods by selling them at private sale, peddling them about, hunting up buyers, and actually selling them for more than they would have brought at auction, than in the case of an auction sale.

XXII.

We have not contended and do not contend that anything that was "on fire," can be taken into consideration in estimating the losses which should be contributed for in general average. But we do insist that the articles that were "on fire," or "touched by fire," in amount and value, constitute much less than ten per cent of the damaged cargo of libelant, and if all the articles which were "on fire," "charred," "singed," "scorched," and or "blistered" are deducted, the allowance in favor of libelant would not be greatly reduced below the figures stated in this brief.

By the terms of the contract of affreightment—the bill of lading—the adjustment in general average is to be made in accordance with the York-Antwerp Rules of 1890, and those rules require everything to be brought into the adjustment, except articles that "have been on fire," and that these words do not include articles that were not "touched" by the fire—that did not come into "physical contact" with the fire, and that, therefore, "scorched" or "blistered" articles should be included in the adjustment, as having been damaged by a general average act or sacrifice, we think we have clearly shown.

XXIII.

List of articles referred to in this brief as affected by fire:

All the damage done by the fire is shown by the following uncontradicted testimony:

JUDGE WOOD, witness for claimant says:

"Some of the packages were very much discolored,

and, of course, a few were actually burned by the fire, *but not many.* (Rec. p. 769).

A. G. LANE, witness for libelant says:

"The damage to the piano was caused by the steam pressure and heat." (Rec. p. 332).

The steam penetrated everything, (Rec. p. 332).

One end of the bar fixtures was charred and had to be scraped off. (Id. p. 333).

There was very little of the furniture burned, it was water soaked and steam soaked, (Id. p. 335).

The ale barrels were scorched (Id. p. 337).

The scenery was injured by steam, and some of it was scorched, (Id. 346).

The linoleum had not been touched by fire, (Id. p. 365).

One end of the bar was scorched, but the furniture was not burned at all, (Id. p. 365).

The barrels were not scorched by fire, more than one or two, (Id. p. 368).

The piano was not scorched, the outside box was scorched a little, (Id. 368).

There was one roll of scenery that had one end scorched, (Id. p. 368).

The case goods were not scorched, two or three of them, I think, were smoked, (Id. p. 369).

There was one barrel of crockery ware that was considerably scorched, (Id. p. 370).

The ends of some of the champagne cases were smoked, (Id. p. 370).

Think some of the barrels of liquor, two or three, were scorched a little on the outside, (Rec. p. 371).

But none of the case goods, except some that were smoked, (Id. p. 371).

Probably one-fourth of 108 doors were scorched on the ends, that is, the end of the bundle, (Id. p. 371).

Think two of the big crap tables that were cased up, the outside casing, was scorched on two of them, (Id. p. 373).

There were some of the ends of the finishing lumber that were scorched some, but they were not badly scorched, (Id. p. 374).

Not over three or four bundles were burned any, (Id. p. 374).

There was a crate of kitchen utensils that was badly scorched, (Id. p. 375).

There were a few of the barrels scorched some, don't know whether whisky or porter, (Id. p. 375).

There was a full kitchen outfit and canned groceries damaged by fire, (Id. p. 701-855).

And a couple of barrels of stuff burned and thrown overboard, (Id. p. 855).

GEO. A. L'ABBE, witness for libelant, says:

Saw some cases of wine brought out of the hold, that were charred and burned, (Id. p. 402).

The wines and bar fixtures were all burned up, (Id. p. 403).

I looked at our stuff and it was not good, it was all —the most of it I looked at was burned up, (Id. p. 403).

Now, it is apparent that this is a mere general statement of the witness, made to express forcibly, his idea that the goods were damaged, but not necessarily, "burned up," because that would not be true, as shown by his own, and the testimony of all the other witnesses. In that connection, he was asked:

Question: "You did not examine it specially to ascertain the amount of the damage?" And he answered: "No sir." (Id. p. 403).

The fire lasted three or four days, (Id. p. 404-5).

After the fire was put out, they brought some of the cases of wine on deck, the cases were charred, (Id. p. 405).

Some of the cases (of wine) that were brought up, were burned pretty near through, (Id. 406).

I know it burned the lumber and furniture some, (Id. p. 406).

The fire had gotten into the groceries, (Id. p. 407). But this statement is qualified by the next answer in which he says the steam had gotten into the canned goods, (Id. p. 407).

T. J. CONSIDINE, witness for libelant says:

The portion of the cargo brought up after the fire, some of the packages were scorched and burned, (Id. p. 433).

Some of the damage was from smoke, *a little fire,* and the most from steam and heat, (Id. p. 434).

F. G. PETERSON, witness for libelant, says:

There were one or two mattresses burned a little, (Id. p. 465).

The bar fixtures were injured a little by the fire, (Id. p. 466).

There were a few of the champagne cases burned, (Id. p. 468).

One barrel of whisky was scorched, (Id. p. 473).

There were a few cases of champagne scorched a little, (Id. p. 482).

There was one barrel of beer scorched, (Id. p. 484).

The bar fixtures were scorched a little, (Id. p. 487).

There was one bundle of carpet scorched, (Id. p. 493).

The tents were smoked, (Id. p. 494).

Two mattresses were scorched some, (Id. p. 496).

W. A. MALLOY, witness for libelant, says :

Some of the champagne cases were thrown overboard, and when the cargo was landed there were 13 or 14 cases short, (Id. p. 500).

There were some of the cases burned, but very few, (Id. p. 500).

And some of the bottles broken by the fire, (Id. p. 500).

One case was burned through, and six or seven or eight cases scorched, (Id. p. 500-1).

H. C. GORDON, witness for libelant, says:

Many packages showed marks of fire, (Id. p. 502).

The bar fixtures were scorched, (Id. p. 504).

The corks and labels were singed, (Id. p. 511).

The rubber stamps were near the heat, (Id. p. 413).

A number of window frames were scorched, (Id. p. 517).

Three or four doors were scorched, (Id. p. 517).

The skeleton safes were blistered, (Id. p. 519).

The sewer pipe must have been in the neighborhood of extreme heat, (Id. p. 522).

The cigar cases were charred, (Id. p. 525).

The bar fixtures had been damaged by heat, and one corner of the piano box was scorched, (Id. p. 529).

Don't think the flames injured the interior of the piano, (Id. p. 529). It did not burn through the casing. (Id. 530). The bax was charred on one end, or side, (Id. p. 530).

The corks and labels were in a sack, and had been very near the the fire, (Id. p. 534).

The smoke discolored the wardrobes, (Id. p. 535).

W. A. MALLOY, Con'd:

There were probably ten cases thrown overboard, (Id. p. 567).

The fire was not very extensive, (Id. p. 569).

The roll-top desk was blistered, (Id. p. 585).

One or two kegs of nails were burned, (Id. p. 602).

The goods in exhibit 38 were burned, (Id. 658).

One or two blankets were scorched, (Id. p. 659).

There were two or three barrels charred—two in particular, (Id. p. 662).

Some of the legs of the tables were blistered, (Id. p. 665).

They were in crates, and the crates showed that they had been in connection with the fire, (Id. p. 666).

The big suit wheel had the glass cracked, seemed to be close to a lot of heat, (Id. p. 667).

One keg of nails was scorched, (Id. p. 668).

Exhibits 83 and 84 were supposed to be where there was considerable fire, but they were not scorched or burned, (Id. p. 670).

Exhibit 84 was blistered, not scorched, (Id. p. 671).

The dice were melted, they were where there was a lot of heat, (Id. p. 672). I didn't notice any sign of fire on the package they were in, (Id. p. 672).

A. G. LANE, Con'd:

Exhibit 14 had been right in the fire, the crate was charred, (Id. p. 680).

The corners of some of the blankets were burned, (Id. p. 683).

The groceries were close to the fire, (Id. p. 686).

The big tent had 100 holes burned in it, (Id. p. 686).

F. G. PETERSON, Con'd:

One pair of blankets burned, (Id. p. 705).

The envelopes were spoiled by fire, (Id. p. 713).

Some of the brushes were burned, (Id. p. 717).

The aprons, towels, etc., were smoked, (Id. p. 719).

H. C. GORDON, Con'd:

A small part of the finishing lumber was charred by fire, (Id. p. 735).

Some of the crates of doors were burned through, and the corners of the doors burned, (Id. p. 743-4).

One box of cigars had been scorched, (Id. p. 746).

This list embraces everything that was even remotely touched or in any manner injured by the fire, and by smoke, or the heat of the fire, and, by comparing it with the exhibits it will be seen at once that it comprises much less than one-tenth of the cargo belonging to libelant.

As Judge Wood says: "Oh yes, some of the packages were very much discolered, and, of course, a few were actually burned, by the fire, *but not many.*" (Rec. p. 769).

And Malloy says: "The fire was not very extensive." (Rec. p. 569).

And Considine says: "Some of the damage was from smoke, a *little fire*, and the most from steam and heat." (Rec. p. 434).

There is no conflict in the evidence on this point, nor is there any evidence to the contrary, nor anything to show that any other portion of the cargo except that stated in this list was in any manner damaged by the fire, or the heat from the fire.

When the witnesses speak of damage by "heat," it is clear that they mean the heat caused by the steam put in the hold to extinguish the fire.

This list shows all the articles of the cargo subject to "particular average," of which the appellant attempted to make so much in the District Court. And when it is deducted from the total cargo, even if the Court should think that articles "scorched," or "blistered," fall within the provisions of Rule 111, "Such separate packages of cargo, as have been on 'fire,'" it will fall far short of embracing one-tenth of libelant's cargo.

Wherefore libelant respectfully asks this Court to carefully consider and weigh all the evidence in this case and to render such decree, or direct the District Court to do so, as the evidence shows the libelant to be entitled to.

Respectfully submitted,

WM. H. BRINKER,

Proctor for Libelant and Appellee.

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CHARLES NELSON CO.,
Appellant,

vs.

THE STANDARD THEATRE CO.,
Appellee.

No. 1367.

Supplemental Brief of Appellee

Wm. H. BRINKER,
Proctor for Libelant and Appellee

SEATTLE, WASH.

YERKES PRINTING CO. TIMES BUILDING SEATTLE

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Supplemental Brief of Appellee

To the Honorable, the Judges of the United States Circuit Court of Appeals, for the Ninth Circuit.

The appellee respectfully prays the Court for leave to file a supplemental brief herein, in answer to the brief filed by appellant, and shows to the Court:

That this cause was originally set for hearing on Oct. 11th, 1906, afterwards at appellant's request continued to February 4th, 1907, and again at appellant's request passed to the foot of the calendar of the February term and set for March 13th, 1907, with the understanding that appellant's brief should be served thirty days before the hearing.

That on February 27th, 1907, appellant having failed to serve its brief, appellee's proctor wrote the proctor for appellant that appellee would put its brief in the hands of the printers on March 1st, 1907, which was done; and March 5th, appellee served its brief upon appellant by registered mail and sent twenty copies by express to the Clerk of this Court. On March 6th, 1907, appellant served its brief on appellee by mail.

Appellee states that the brief of appellant not having been filed within the time stipulated, nor within the time prescribed by the rules of this Court, appellee feared that appellant might not file its brief at all, and, being desirous of having the cause determined anew by this Court, prepared, printed and filed its brief, long after appellant's brief was due. Appellant's brief having been served on appellee after appellee's brief had been forwarded to the Clerk of this Court and appellee not having therefore, an opportunity to answer the same in its original brief, will not ask to strike the brief of appellant, as it might do, but asks leave to answer it, as well as it may in the very limited time left to it, in this supplemental brief.

Assuming that the leave prayed for will be granted, appellee will endeavor to answer appellant's argument.

I.

Appellant first contends that because the right to general average was a part of the Bill of Lading, which provided that general average should be adjusted according to the York-Antwerp Rules of 1890, the other clauses of the Bill of Lading which it copies on pages 6 and 7 of its brief, should in effect, nullify the provis-

ion for general average, but we insist that this position is not only unsound, but illogical, for if the clause providing that general average must be according to the York-Antwerp Rules, is to be held a part of the contract of carriage, then it is in conflict with the other clauses which appellant quotes, and it being the contract furnished by the ship, any ambiguity or conflict in it should be resolved in favor of the appellee.

Garrison vs. U. S., 7 Wall. 688.

But we insist that there is no conflict and that the clause concerning general average is no part of the contract of carriage, but upon an entirely different subject, and that the other clauses of the Bill of Lading quoted on pages 6 and 7, relate wholly to damages growing out of a breach of the contract of carriage by the appellant, such as loss by negligence, &c., and that therefore the two subjects being entirely separate, the liability of the ship to contribute in general average in case of a sacrifice, is in no manner affected by its liability to, or exemption from, losses caused by negligence or otherwise. And while appellant has learnedly exhausted the authorities in any manner bearing on the subject, we submit that they do not sustain the position taken.

Much argument is consumed in an effort to demonstrate that the right to general average is a matter of contract and not a right given by the maritime law; but whether this point has been demonstrated or not by appellant, we say is wholly immaterial, for if it is given by the maritime law as decided by the case of *Anderson vs. Ocean Steamship Co.*, 10 App. Cas. 107, (cited by appellant, pp. 10-11 of brief) and as universally held by the courts of the United States.

(The Irrawaddy 171 U. S. 187), the appellant is entitled to its benefits and subject to its burdens, as are all other interests in the adventure; but if it can only arise from contract, then we say the contract (Bill of Lading clause "a" quoted on page 4 of appellant's brief) in this case, has provided for it.

Appellant places great reliance upon the case of the Carron Park, 15 Prob. Div. 300, as supporting its position that general average is purely a matter of contract and says that case has ever since been the law of England. This may be true, and still it is not the law in the United States, for the Supreme Court expressly refused to follow it in the case of The Irrawaddy 171 U. S. 187. In the ~~Crown~~ arrow Park case it was held that as the shipowner was by contract exempt from liability for negligence, he was entitled to contribution in general average; but in The Irrawaddy case the Supreme Court held that as the ship owner was exempt from liability for negligence by statute, he was *not* entitled to contribution in general average.

Appellant has not cited a case, and we believe no case can be found which holds that the terms of a Bill of Lading, such as those quoted by appellant on page 6 of its brief, have anything to do with general average.

On the contrary, all the cases hold that those, or similar clauses, concern solely the contract of carriage and liabilities arising from its breach.

Phoenix Ins. Co. vs. E. & W. Trans. Co., 117 U. S. 312

The Roanoke, 59 Fed. Rep. 161.

S. C., 53 Fed. Rep. 270.

S. C., 46 Fed. Rep. 297.

Therefore the clauses quoted that no lien shall attach to the vessel, and that in case of loss the claim shall be restricted to the value at the port of shipment, have nothing to do with general average, and have no possible bearing on this case.

Appellant makes an ingenious argument to show that the provisions of clause "c" of the Bill of Lading, for the settlement of claims arising from a breach of the contract of affreightment, because the word "adjusted" is used, refers to adjustments in general average. No time need be spent in answering this argument.

Appellant next claims the benefit of the insurance which appellee had upon its cargo, under clause "d" of the Bill of Lading.

This claim is disposed of most effectually by the cases of the Roanoke (59 Fed. R. 161) and *Phoenix Ins. Co. vs. E. & W. Trans. Co.* (117 U. S. 312), neither of which have ever been questioned. In the last case the Supreme Court enforced the clause as a part of the contract of carriage, but in effect held that it did not apply to general average, for it affirmed the judgment of the Court below that the ship should contribute in general average.

II.

Appellant next contends that if the San Francisco adjustment is to be the basis of appellee's right to recover, then the ship should only contribute its proportion, presumably after deducting the value of the entire cargo, and quotes from the libel that there were no courts or facilities at Nome for an adjustment in general average,

and says it was impracticable for the ship to detain the cargo or bring it back to the port of shipment.

Now, there is nothing in the record to sustain this statement. It was not necessary for the ship to detain the cargo on board, for it had a warehouse at Nome and it could have landed the cargo and still retained its lien for general average contribution, or it could have made a qualified delivery and still retained its lien.

Wellman vs. Morse, 76 Fed. Rep. 573,

and there would have been nothing ruinous in this, as appellant asserts.

Appellant says the evidence is undisputed that an average bond was impracticable.

There is nothing in the evidence to support this statement. On the contrary the evidence shows that the cargo was valuable, and it is to be presumed that the owners of it could have furnished any reasonable security for the payment of their contributions, if any such had been demanded, but the evidence shows that none was demanded.

In the absence of any evidence of an attempt on the part of the ship owner or master to obtain average bonds or agreements, it cannot reasonably be assumed that none would have been furnished.

If none could have been obtained it was easy to prove that fact, yet no effort was made to prove it.

Therefore the rule is well settled that the ship is responsible for the contributory share of all cargo, which it delivered without making an effort to obtain security.

Crooks vs. Allen, 5 Q. B. Div. (1879) 38.

1 *Pars. Mar. Law*, 330.

Heye vs. North German Lloyd, 33 Fed. Rep. 60.

The Alliance, 64 Fed. Rep. 871.

But we submit that this discussion is unnecessary, for the ship was not held to contribute for the balance of the cargo so unconditionally delivered, but only upon the value of the ship and freight, and the adjustment sought here is only upon the ship and freight and the cargo appellee.

III.

Appellant next attacks the San Francisco adjustment and cries "fraud," and to support this cry says that appellee submitted affidavits to the adjuster showing its loss and that two years after it submitted other affidavits increasing its loss nearly $20,000. It is perhaps sufficient answer to this to say that the assertion is not borne out by the record; that no such affidavits were introduced in evidence in the Court below and nothing to show that they were produced before the adjuster, except the questions put to La Boyteaux (Rec. pp. 113-115). So it seems to appellee that appellant has set up a mere man of straw for the purpose of having the amusing exercise of knocking it down again.

But whatever proofs may have been submitted to the adjuster in San Francisco, we maintain are now wholly immaterial. Appellee is not trying to sustain that adjustment. It understood the District Court to hold it of no avail, and appellee then proceeded to produce the evidence upon which that Court could, and this can, make a fair and impartial adjustment.

But even if such affidavits as appellant mentions had

been submitted to the adjuster, or introduced in evidence, any conflict in them would only go to the credibility of the particular witness. It would be no evidence of fraud on the part of appellee.

IV.

Appellant says that a large portion of the goods that were allowed to participate in general average were injured by fire and smoke. As to this we assert that it does not clearly appear from Mr. La Boyteaux's evidence just what portion of the cargo was included in his adjustment, nor how much of it, if any, was injured by fire and smoke. But in the trial in the District Court every article that had "been on fire" as prescribed in the York-Antwerp Rules, No. 3, was pointed out in the evidence by appellee and the Court asked to lay those out of the case.

But appellant, although now vehemently claiming that a large part of the cargo was damaged by fire, sedulously refrained from introducing any evidence to sustain that position in the Court below. It did not call as a witness the captain of the vessel, nor a single member of the crew who must have seen and handled each article of cargo as it was discharged from the ship. It did not call a single lighterman, or longshoreman, or warehouseman who also saw and handled each article of the cargo. Although it had Judge Wood on the stand, it asked him but one question on the subject, (Rec. p. 769). It took the deposition of Gollin, a man who testified that he had been for 25½ years manager of a Marine Insurance company, and had much experience in adjusting such losses, and who was employed at a salary of $50 per day to examine and survey and appraise the damage on this cargo, and who, if he made a thorough, conscientious examina-

tion of the cargo, from his long experience in such matters, was the best qualified to determine what particular goods were injured by fire and what by water or steam, for if he had the long experience he says he had, he knew the importance of seggregating the articles which had "been on fire" from those damaged by water or steam, yet, appellant asked him but *two questions* on the subject.

By Mr. Frank: "Q Now, Mr. Gollin, was there any portion of the Standard Theater Company's goods showed scorching or other effects of fire?" "A. There was a great deal of damage done by steam."

"Q. Outside of steam?"

A. There were signs of scorching there." (Rec. p. 164).

And there appellant and its witness leave the subject, and never return to it.

Now, as the pleadings were amended in this case in the Court below, after that Court had laid aside the San Francisco adjustment, they made a case for an original adjustment in general average by the Court, and that was not an adversary proceeding, in the ordinary sense of that term, but was more in the nature of an amicable equitable proceeding to ascertain the exact truth, let the damage fall where it might. The final determination might have been a judgment against appellee although it initiated the proceeding, just as the final result of the San Francisco adjustment was a finding against appellant, although appellant inaugurated that proceeding and selected its own adjuster without consulting any other interests; and we say that in such an equitable proceeding it is the duty of all concerned to produce the facts, and all of the facts, to the Court, and that where the record

shows, as this record does, that one party could have produced evidence showing just what the true facts were, and yet did not, such party will not be heard to say that all the facts were not proven.

And in this case, the record shows that appellant had it in its power by its witnesses Wood and Gollin and by the master and crew of the ship who handled the cargo, to show each article which "had been on fire," but that it did not see fit to examine them on that subject. It ought not now to be heard to say that the articles which "had been on fire" were not seggregated from those injured by water and steam.

Contrasted with the conduct of appellant, appellee shows by its witnesses all that was humanly possible to show, concerning the articles which "had been on fire," and pointed them out in its brief in the Court below as it has pointed them out in its original brief here, with reference to pages of the record, and from this the Court can separate the items subject to "particular average" from those subject to "general average," and adjust the rights of the parties as nearly right and fair as it is possible under the circumstances, and when this is done appellee will be satisfied.

Appellant in its brief points out some of the articles which had been on fire, but appellee points out more, and a comparison of these with the exhibits will show that their value is small in proportion to the value of the entire cargo of appellee.

It has not been practicable for appellee, in the preparation of its brief, to calculate and state the exact value of the articles which had been on fire, since this appeal was taken for the reason that all of the original exhibits,

invoices, &c., containing the necessary data, had been sent to this Court with the Apostles and they were not available to appellee for use in making a comparison and calculation to ascertain and separately state such value.

But, as said above, there is enough in the record to enable this Court to make the seggregation, and also to make and decree a fair adjustment in this matter.

It will be remembered that the evidence shows that when appellee caused an examination of its cargo to be made at Nome, it was made, not for the purpose of a general average adjustment, but for the purpose of making its proof of loss to the insurance companies, and it thought all damage suffered by its cargo was covered by its policies, whether done by fire, or by water and steam used to extinguish the fire, and when the testimony was taken in the court below a long time had elapsed since the disaster and it was practically impossible for witnesses unskilled in such matters to remember each particular article which had been on fire, but they stated it according to their best recollection. We submit that this is all that is required, for the law will not insist upon an impossibility.

Respectfully submitted,

WM. H. BRINKER,

Proctor for Appellee.

No. 1408

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

JOHN J. CAMBERS,

Plaintiff in Error,

vs.

THE FIRST NATIONAL BANK OF BUTTE (a Corporation),

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court for the District of Oregon.

FILMER BROS. CO. PRINT, 1642 HOWARD STREET, S. F.

No. 1408

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In the Circuit Court of the United States for the District of Oregon.

No. 2858.

August 25, 1906.

J. J. CAMBERS

vs.

FIRST NATIONAL BANK OF BUTTE et al.

Order Extending Time to Docket Cause.

Now, at this time, it appearing to the Court that there is not sufficient time in which the clerk of this court can prepare the transcript of record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in this cause, it is ordered that the time heretofore allowed in which to file said transcript of record in said Circuit Court of Appeals be, and the same is hereby, extended thirty days.

WILLIAM H. HUNT,

Judge.

[Endorsed]: No. 1408. United States Circuit Court of Appeals for the Ninth Circuit. Order Extending Time to Docket Cause. Filed Aug. 30, 1906. F. D. Monckton, Clerk. Re-filed Nov. 20, 1906. F. D. Monckton, Clerk.

In the Circuit Court of the United States for the District of Oregon.

No. 2858.

October 1, 1906.

JOHN J. CAMBERS,

vs.

FIRST NATIONAL BANK OF BUTTE, ANDREW J. DAVIS, and GEORGE ANDREWS.

Order Extending Time to Docket Cause.

Now, at this day, for good cause to the Court shown, it is ordered that the time heretofore allowed the above-named plaintiff in which to file the transcript of record in this cause, in the Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended thirty days.

WM. B. GILBERT,
Circuit Judge.

[Endorsed]: No. 1408. United States Circuit Court of Appeals for the Ninth Circuit. Order Extending Time to Docket Cause. Filed Oct. 1, 1906. F. D. Monckton, Clerk. Re-filed Nov. 20, 1906. F. D. Monckton, Clerk.

Citation on Writ of Error.

United States of America,
District of Oregon,—ss.

To First National Bank of Butte, a Corporation, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Oregon, wherein John J. Cambers is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland, in said district, this August 7, 1906.

WILLIAM H. HUNT,
Judge.

Due service of within citation by certified copy is hereby accepted in Multnomah County in said district this 7th day of August, 1906.

DOLPH, MALLORY, SIMON & GEARIN,
Attorneys for Deft. First Natl. Bank of Butte.

[Endorsed]: U. S. Circuit Court, District of Oregon. John J. Cambers vs. First Natl. Bank of Butte. Citation on Writ of Error. Filed August 7, 1906. J. A. Sladen, Clerk. By G. H. Marsh, Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

JOHN J. CAMBERS,

Plaintiff in Error,

vs.

FIRST NATIONAL BANK OF BUTTE (a Corporation),

Defendant in Error.

Writ of Error.

The United States of America—ss.

The President of the United States of America, to the Judges of the Circuit Court of the United States for the District of Oregon, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the Circuit Court before the Honorable Charles E. Wolverton, one of you, between John J. Cambers, plaintiff and plaintiff in error, and First National Bank of Butte, a corporation, Andrew J. Davis and George W. Andrews, defendants and First National Bank of Butte, a corporation, defendant in error,

a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this August 7, 1906.

[Seal] J. A. SLADEN,

Clerk of the Circuit Court of the United States for the District of Oregon.

By G. H. Marsh,

Deputy Clerk.

The within writ of error was served upon the Circuit Court of the United States for the District of

Oregon by lodging with me, as clerk of said court, a duly certified copy of said writ, on August 7, 1906.

J. A. SLADEN,
Clerk U. S. Circuit Court, District of Oregon.
By G. H. Marsh,
Deputy Clerk.

[Endorsed]: In the U. S. Circuit Court of Appeals for the Ninth Circuit. John J. Cambers, Plaintiff in Error, vs. First National Bank of Butte, Defendant in Error. Writ of Error. Filed August 7, 1906. J. A. Sladen, Clerk United States Circuit Court, District of Oregon. By G. H. Marsh, Deputy Clerk.

In the Circuit Court of the United States for the District of Oregon.

October Term, 1904.

Caption.

Be it remembered, that on the 10th day of February, 1905, there was duly filed in the Circuit Court of the United States for the District of Oregon, an amended complaint, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN J. CAMBERS,

Plaintiff,

vs.

FIRST NATIONAL BANK OF BUTTE (a Corporation), ANDREW J. DAVIS, and GEORGE W. ANDREWS,

Defendants.

Amended Complaint.

The plaintiff for a cause of action against the defendants and each of them alleges:

That during all the times herein mentioned the plaintiff has been and now is a citizen and resident and inhabitant of the State of Oregon, residing in Jackson County therein.

That during all the times herein mentioned the defendant, First National Bank of Butte, has been and now is a National Banking corporation, duly organized and existing under and by virtue of the laws of the United States of America, and having its principal place of business in the city of Butte, State of Montana.

That during all the times herein mentioned the defendants, Andrew J. Davis and George W. Andrews have been and now are residents and citizens of the State of Montana, and the said Andrew J. Davis has

been and during all the times herein mentioned now is the president of the said First National Bank of Butte.

That on the 19th day of April, 1902, the plaintiff had on deposit with the defendant bank at its place of business in Butte City, Montana, and the defendant bank held in trust for the plaintiff the sum of ten thousand ($10,000.00) dollars, lawful money of the United States, and the property of the plaintiff.

That on the 19th day of April, 1902, the plaintiff, as party of the first part, entered into a written contract with these defendants as parties of the second part with reference to the retaining by the defendant bank, for the time and on the condition specified in the said contract, the said sum of ten thousand ($10,000.00) dollars, a full, true and correct copy of which contract is hereto attached, marked Exhibit "A," and especially referred to and made a part hereof.

That on the 20th day of March, 1902, in the District Court of Silver Bow County, Montana, there was made and entered a joint judgment in favor of William B. Hamilton, Donald B. Gillies, William Lowery and D. D. McLaughlin, as plaintiffs, against the plaintiff herein, John J. Cambers, and the defendants, Andrew J. Davis and George W. Andrews, defendants therein, for the sum of twelve thousand five hundred ($12,500.00) dollars, upon that certain injunction bond of date November 30th, 1897, for

fifteen hundred ($1,500.00) dollars, and that certain injunction bond of date January 11th, 1898, for the sum of eleven thousand ($11,000.00) dollars, both of which bonds are mentioned in said Exhibit "A" hereto attached. That the judgment for the sum of twelve thousand five hundred ($12,500.00) dollars, mentioned in said Exhibit "A" was rendered in said action and said Court and cause upon the two said injunction bonds, and the liability of the said defendants Davis and Andrews, and of each thereof, upon said bonds and each of them was merged into said judgment.

That by the terms of said contract the defendant bank undertook and agreed to hold said sum of ten thousand ($10,000.00) dollars, pending an appeal of said cause to the Supreme Court of the State of Montana and the termination of such appeal, and that if the defendants, Andrews and Davis, should be required to pay said sum of twelve thousand five hundred ($12,500.00) dollars, or any part thereof, to indemnify them, from said sum of ten thousand ($10,000.00) dollars, so held in trust for said purpose, but that if said defendants should not be required to pay said judgment or any part thereof, that then said bank should return to this plaintiff the said sum of ten thousand ($10,000.00) dollars.

That the appeal from said judgment mentioned and contemplated in said contract was never perfected, and the time within which the same can be

perfected has long since gone by, and no appeal can now be taken from said judgment nor from any part thereof.

That within the sixty days immediately prior to the 21st day of August, 1902, an execution upon said judgment was duly issued and placed in the hands of the sheriff of said Silver Bow County, Montana, with direction to him to collect the said sum of $12,500.00 from the defendants in said cause as by law provided, which execution was by its terms and by the law of Montana applicable thereto returnable within sixty days from the date thereof.

That on the 21st day of August, 1902, and before the time when said execution would have expired, and while the same was in full force and effect, said sheriff of Silver Bow County, Montana, returned said execution, fully satisfied, to the clerk of said district court. That by the laws of the State of Montana then in force, it became and was then the duty of said clerk to enter a satisfaction of said judgment upon the judgment docket of said court, and said clerk did thereupon, on said 21st day of August, 1902, duly enter a satisfaction of said judgment upon said judgment docket, and satisfy said judgment as to each and all the defendants in said cause, and said satisfaction when so entered constituted a full and complete satisfaction and discharge of said judgment, and the same was at said time fully satisfied and discharged. That by the laws then and now in

force in the State of Montana, the entry of said satisfaction of judgment by said clerk fully satisfied said judgment, and relieved each of said parties against whom said judgment had been entered from any liability thereon. That said satisfaction of judgment has never been vacated, set aside or annulled, and by the laws then and now in force in the State of Montana, the time within which said judgment could have been reinstated or the satisfaction thereof vacated has long since gone by.

That the defendants herein had not, nor had either or any of them, paid said judgment, or any part thereof prior to August 22, 1902, nor have they or either or any of them ever paid the same or any part thereof, nor are they or either or any of them liable to pay said judgment or any part thereof, nor can the same or any part thereof be enforced against them or either or any of them.

That the laws in force in the State of Montana at all times herein mentioned, governing the rate of interest, where no rate is provided by contract, entitle the plaintiff to interest at 8 per cent per annum, upon the said sum of ten thousand ($10,00.00) dollars, from the date when the same became due and payable to the plaintiff, to wit, August 21, 1902. That by the terms of said contract said defendants, Andrews and Davis undertook and agreed that they would pay to the plaintiff interest at 6 per cent per

annum, upon the said sum of ten thousand ($10,000.00) dollars, for so long a time from April 19th, 1902, as the said sum of ten thousand ($10,00.00) dollars should remain on deposit with the said defendant bank.

That by reason thereof the plaintiff is entitled to recover from the defendants, Andrews and Davis, interest upon the said sum of ten thousand ($10,000.00) dollars, at 6 per cent per annum, from April 19th, 1902, until the date when the said sum of ten thousand ($10,000.00) dollars became payable from the defendant bank to the plaintiff, to wit, August 21, 1902, and is entitled to recover from said bank said sum of ten thousand ($10,000.00) dollars, and interest from August 21, 1902, until paid, at the rate of 8 per cent per annum.

That the said sum of ten thousand ($10,000.00) dollars is still on deposit with said defendant bank, and it has never repaid the same, or any part thereof to the plaintiff, although demand therefor has been made long prior to the filing of this action.

Wherefore the plaintiff demands judgment against the defendant, First National Bank of Butte, for the sum of ten thousand ($10,000.00) dollars, and interest thereon from August 21st, 1902, at the rate of 8 per cent per annum until paid; and from the defendants Andrew J. Davis and George W. Andrews, interest at the rate of 6 per cent per annum upon the

sum of ten thousand ($10,000.00) dollars from the 19th day of April, 1902, until the 21st day of August, 1902; together with his costs and disbursements herein to be taxed.

A. E. REAMES and
VEAZIE & FREEMAN,
Attorneys for Plaintiff.

Exhibit "A."

This agreement made and entered into this 19th day of April, 1902, by and between John J. Cambers of the State of Oregon, the party of the first part, and Andrew J. Davis, George W. Andrews and the First National Bank of Butte, Montana, all of the City of Butte, Montana, parties of the second part, witnesseth:

That whereas, the said John J. Cambers has on deposit with the First National Bank of Butte the sum of ten thousand ($10,000.00) dollars, in accordance with the following stipulations and agreements, pending the appeal hereafter mentioned.

That whereas heretofore the said Andrew J. Davis and the said George W. Andrews, mentioned above, on or about the 30th day of November, 1897, executed and delivered as sureties a certain injunction bond on behalf of the said John J. Cambers, in the sum of fifteen hundred ($1,500.00) dollars, in an action then pending in the District Court of Silver Bow County, State of Montana, wherein the said John J. Cambers

plaintiff, and one, William Lowery, and others, were defendants, and thereafter on or about the 11th day of January, 1898, the said Andrew J. Davis and George W. Andrews executed and delivered a certain other injunction bond or undertaking on behalf of the said John J. Cambers, in the sum of eleven thousand ($11,000.00) dollars, in an action then pending in the Supreme Court of the State of Montana, wherein the said John J. Cambers was plaintiff and appellant, and William Lowery and others defendants and respondents, and that at this time the said Andrew J. Davis and George W. Andrews are desirous of having the said John J. Cambers indemnify and secure them against any and all liabilities which they may have incurred, and

Whereas, the said William Lowery, William B. Hamilton, David McLaughlin and Donald B. Gillies, as plaintiffs, v. John J. Cambers, Andrew J. Davis, George W. Andrews, John Doe and Richard Roe, defendants, cause No. 8038, in the District Court of Silver Bow County, State of Montana, obtained a judgment against the said defendants, and said judgment was made and given in favor of said plaintiffs and against said defendants in the sum of twelve thousand five hundred ($12,500.00) dollars and costs, on the —— day of ———, 1902, and the said John J. Cambers is desirous of appealing from the said judgment to the Supreme Court of the State of Montana,

and that it is necessary to give a supersedeas bond to stay execution on the said judgment:

It is therefore understood and agreed that the said sum of ten thousand ($10,000.00) dollars now on deposit in the said First National Bank of Butte is to indemnify said Andrew J. Davis and George W. Andrews against any liability on the injunction bonds, and can be used in assisting said Cambers in securing said supersedeas bond, and First National Bank hereby agrees that said sum of ten thousand ($10,000.00) dollars shall remain in said bank, subject, however, to secure the sureties upon any supersedeas bond given to stay execution on said judgment during the pendency of a motion for a new trial in the said District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, or pending the appeal to the Supreme Court of the State of Montana, and that this contract may be assigned for said purpose.

That said money shall not be drawn out of the said bank by any of said sureties of said Cambers, pending the appeal in said cause, but shall remain on deposit in the said bank to be paid to said sureties in repayment of any sum or sums which they may be required to pay as such sureties, and in case of no liability on the part of said sureties, or said George W. Andrews and Andrew J. Davis, by reason of said

injunction or stay bond, then to be paid to the said Cambers or his order.

It is further expressly understood and agreed that unless said John J. Cambers shall give a good and sufficient stay bond pending his said motion for a new trial in the said case, if required, or pending said appeal to the Supreme Court of the State of Montana, that this contract shall be null and void, and that one of the considerations on the part of the said Andrew J. Davis and George W. Andrews is that the said John J. Cambers shall give a good and sufficient stay bond to stay execution on the said judgment, and in the event said District Court shall fail or refuse to grant him a new trial, that he will perfect his appeal to the Supreme Court of the State of Montana, and give good and sufficient appeal bond pending said appeal, to the effect that the sureties are bound for double the amount named in the judgment.

That if the judgment and order appealed from or any part thereof be affirmed or the appeal dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount to which the judgment order is affirmed, or affirmed only in part, and all damages or costs which may be awarded appellant on appeal.

It is further understood and agreed that the said Andrew J. Davis and the said George W. Andrews, in consideration of the deposit by the said John J. Cambers of the sum of ten thousand dollars ($10,-

000.00), in the First National Bank of Butte, as aforesaid, agree to pay the said John J. Cambers or his agent, interest upon the said sum of ten thousand ($10,000.00) dollars, at the rate of six per cent per annum from the date hereof, said interest to be paid semi-annually until said cause be decided on appeal, so long as said sum of ten thousand ($10,000.00) dollars shall remain on deposit in said bank.

This agreement and stipulation is not intended to bar or prevent the said Andrew J. Davis or George W. Andrews, or either of them, from setting up or taking any defense to any action brought upon said injunction bonds, or either of them, or from taking any action that they may desire in protecting their interests in the premises, as to themselves.

Signed in triplicate this 19th day of April, 1902.

JOHN J. CAMBERS.
GEORGE W. ANDREWS.
ANDREW J. DAVIS.
FIRST NATIONAL BANK OF BUTTE,
By E. B. WEINER,
Cashier.

United States of America,
District of Oregon,
County of Jackson,—ss.

I, John J. Cambers, being first duly sworn, depose and say that I am the plaintiff in the above-entitled

action; and that the foregoing amended complaint is true as I verily believe.

JOHN J. CAMBERS.

Subscribed and sworn to before me this 7th day of February, 1905.

A. E. REAMES,
Notary Public for the State of Oregon.

State of Oregon,
County of Multnomah,—ss.

Due service of the within amended complaint is hereby accepted in Multnomah County, Oregon, this 10th day of February, 1905, by receiving a true copy thereof, duly certified to as such by one of the attorneys for the plaintiff.

DOLPH, MALLORY, SIMON & GEARIN,
By M. D.
Attorney for Deft.

Filed February 10, 1905. J. A. Sladen, Clerk U. S. Circuit Court, for District of Oregon.

And afterwards, to wit, on the 13th day of February, 1905, there was duly filed in said court a stipulation allowing defendant time to plead, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN J. CAMBERS,

Plaintiff,

vs.

FIRST NATIONAL BANK OF BUTTE (a Corporation), ANDREW J. DAVIS and GEORGE W. ANDREWS,

Defendants.

Stipulation Allowing Defendant Time to Plead.

It is stipulated and agreed between the plaintiff and the defendant the First National Bank of Butte, a corporation, that said defendant First National Bank of Butte may have until March 1, 1905, in which to move or plead to the amended complaint herein filed.

VEAZIE & FREEMAN,
Attorneys for Plaintiff.

DOLPH, MALLORY, SIMON & GEARIN,
Attorneys for Defendant First National Bank of Butte.

Filed February 13, 1905. J. A. Sladen, Clerk U. S. Circuit Court, for District of Oregon.

And afterwards, to wit, on the 28th day of Feruary, 1905, there was duly filed in said court a motion of defendant, First National Bank of Butte, to strike amended complaint from files, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN J. CAMBERS,

Plaintiff,

vs.

FIRST NATIONAL BANK OF BUTTE, ANDREW J. DAVIS and GEORGE W. ANDREWS,

Defendants.

Motion to Strike Amended Complaint from Files.

Now, at this time comes the defendant First National Bank of Butte, a corporation, and moves the Court to strike out and from the files of this Court the amended complaint of plaintiff filed herein—

1st. Because said amended complaint changes the nature of the action commenced by plaintiff from an action in tort to an action on contract.

2d. Because said amended complaint is not an amendment, but an original complaint, setting up an entirely new and distinct cause of action not embraced in the original complaint.

3d. Because said amended complaint substitutes for the cause of action originally stated one entirely different in nature and substance.

DOLPH, MALLORY, SIMON & GEARIN,
Attorneys for Defendant, First National Bank of Butte.

District of Oregon,—ss.

Due service of the within motion by the delivery of a duly certified copy thereof as provided by law, at Portland, Oregon, on this 28th day of February, 1905, is hereby admitted.

J. C. VEAZIE,
Attorney for Plaintiff.

Filed February 28, 1905. J. A. Sladen, Clerk U. S. Circuit Court, for District of Oregon.

And afterwards, to wit, on Thursday, the 9th day of March, 1905, the same being the 135th judicial day of the regular October term of said Court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2858.

March 9, 1905.

JOHN J. CAMBERS

vs.

FIRST NATIONAL BANK OF BUTTE.

Order Fixing Date of Hearing Motion to Strike Amended Complaint from Files.

Now, at this day, on motion of Mr. Frank F. Freeman, of counsel for the plaintiff herein, it is ordered that the hearing of this cause, upon the motion to strike out the amended complaint herein be, and the same is hereby, set for Tuesday, March 21, 1905.

And afterwards, to wit, on Tuesday, the 21st day of March, 1905, the same being the 145th judicial day of the regular October term of said Court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the folowing proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2858.

March 21, 1905.

JOHN J. CAMBERS

vs.

FIRST NATIONAL BANK OF BUTTE.

Hearing of Motion to Strike Amended Complaint from Files.

Now, at this day, comes the above-named plaintiff by Mr. Frank F. Freeman, of counsel, and the defendant by Mr. Joseph Simon, of counsel, and, thereupon this cause comes on to be heard upon the motion to strike from the files the amended complaint herein, and the Court having heard the arguments of counsel, will advise thereof.

And afterwards, to wit, on Tuesday, the 4th day of April, 1905, the same being the 157th judicial day of the regular October term of said Court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2858.

April 4, 1905.

JOHN J. CAMBERS

vs.

FIRST NATIONAL BANK OF BUTTE.

Hearing of Motion to Strike Amended Complaint from Files.

Now, at this day, comes the above-named plaintiff by Mr. J. C. Veazie and Mr. Frank F. Freeman, of counsel, and the defendant by Mr. Joseph Simon, of counsel and thereupon this cause comes on to be heard upon the motion of said defendant to strike from the files of this Court the amended bill of complaint herein, and the Court having heard the arguments of counsel will advise thereof.

And afterwards, to wit, on Thursday, the 8th day of June, 1905, the same being the 41st judicial day of the regular April term of said Court—Present, the Honorable WILLIAM B. GILBERT, United States Circuit Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2858.

June 8, 1905.

JOHN J. CAMBERS

vs.

FIRST NATIONAL BANK OF BUTTE.

Order Fixing Date of Hearing Motion to Strike Amended Complaint from Files.

Now, at this day, on motion of Mr. Frank F. Freeman, of counsel, for the above-named plaintiff, it is ordered that the hearing of this cause, upon the motion of the defendant herein to strike from the files the amended complaint filed in this cause, be, and the same is hereby, set for June 14, 1905.

And afterwards, to wit, on Wednesday, the 14th day of June, 1905, the same being the 46th judicial day of the regular April term of said Court—Present, the Honorable JOHN J. DE HAVEN, United States District Judge, for the Northern District of California, presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2858.

June 14, 1905.

JOHN J. CAMBERS

vs.

FIRST NATIONAL OF BUTTE, et al.

Hearing of Motion to Strike Amended Complaint from Files.

Now, at this day, comes the above-named plaintiff by Mr. Frank F. Freeman, of counsel, and the defendants herein by Mr. Joseph Simon, of counsel, and thereupon this cause comes on to be heard upon the motion of said defendants for an order striking from the files the amended complaint herein, and the Court having heard the arguments of counsel, will advise thereof.

And afterwards, to wit, on Saturday, the 17th day of June, 1905, the same being the 49th judicial day of the regular April term of said Court—Present, the Honorable JOHN J. DE HAVEN, United States District Judge, for the Northern District of California, presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2858.

June 17, 1905.

JOHN J. CAMBERS,

Plaintiff,

vs.

FIRST NATIONAL BANK OF BUTTE (a Corporation), ANDREW J. DAVIS and GEORGE W. ANDREWS,

Defendants.

Order Denying Motion to Strike Amended Complaint from Files.

This cause was heard upon the motion of the defendants herein to strike from the files the amended complaint herein, and was argued by Mr. Frank F. Freeman, of counsel, for said plaintiff, and by Mr. Joseph Simon, of counsel for said defendants. On consideration whereof, it is now here ordered and adjudged that said motion to strike from the files the amended complaint herein be, and the same is hereby, denied.

And it is further ordered that the defendants herein be, and they are hereby, allowed twenty days from this date, in which to plead to said amended complaint.

And afterwards, to wit, on the 17th day of June, 1905, there was duly filed in said court an opinion, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN J. CAMBERS,

Plaintiff,

vs.

FIRST NATIONAL BANK OF BUTTE (a Corporation), ANDREW J. DAVIS and GEORGE W. ANDREWS,

Defendants.

Opinion.

A. E. REAMES and VEAZIE and FREEMAN, for Plaintiff,

DOLPH, MALLORY, SIMON & GEARIN, for Defendant, First National Bank of Butte.

DE HAVEN, J.—In my opinion the plaintiff in both the original and amended complaints attempts to state a cause of action arising upon contract, viz: The contract under which he alleges that he deposited with the defendant bank the money sued for. By the amendment, the theory upon which the action is sought to be maintained is changed by omitting in the certain allegations found in the original

complaint. Whether the amended complaint states a cause of action, or whether the plaintiff will be entitled to recover if it shall appear upon the trial that the judgment recovered against the plaintiff and the defendants Davis and Andrews, in the District Court of Siver Bow County, Montana, has not been in fact paid and fully satisfied by the plaintiff, are questions which do not properly arise upon this motion.

The motion to strike the amended complaint from the files is denied, and that the defendant First National Bank of Butte is allowed 20 days to plead to the amended complaint.

Filed June 17, 1905. J. A. Sladen, Clerk U. S. Circuit Court, for the District of Oregon.

And afterwards, to wit, on the 19th day of June, 1905, there was duly filed in said court a demurrer of defendant, First National Bank of Butte, to the amended complaint, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN J. CAMBERS,

Plaintiff,

vs.

FIRST NATIONAL BANK OF BUTTE, ANDREW J. DAVIS, and GEORGE W. ANDREWS,

Defendants.

Demurrer to Amended Complaint.

Now, at this time comes the defendant First National Bank of Butte, and demurs to the amended complaint of the plaintiff herein filed, because it appears upon the face thereof that said amended complaint does not state facts sufficient to constitute a cause of action against this defendant.

DOLPH, MALLORY, SIMON & GEARIN,
Attorneys for Defendant, First National Bank of Butte.

District of Oregon,—ss.

Due service of the within demurrer by the delivery of a duly certified copy thereof as provided by law, at Portland, Oregon, on this 19th day of June, 1905, is hereby admitted.

VEAZIE & FREEMAN,
Of Attorneys for Plaintiff.

Filed June 19, 1905. J. A. Sladen, Clerk U. S. Circuit Court, for District of Oregon.

And afterwards, to wit, on Friday, the 4th day of August, 1905, the same being the 89th judicial day of the regular April term of said Court—Present, the Honorable JOHN J. DE HAVEN, United States District Judge, for the Northern District of California, presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2858.

August 4, 1905.

JOHN J. CAMBERS

vs.

FIRST NATIONAL BANK OF BUTTE et al.

Order Dissolving Attachment.

Now, at this day, this cause coming on to be heard upon the motion of the plaintiff herein that the attachment, heretofore issued herein, be dissolved, the defendant having heretofore generally appeared in this cause, it is ordered that the attachment herein be, and the same hereby is, dissolved.

And afterwards, to wit, on Tuesday, the 30th day of January, 1906, the same being the 93d judicial day of the regular October term of said Court—the Honorable CHARLES E. WOLVERTON, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2858.

January 30, 1906.

JOHN J. CAMBERS

vs.

FIRST NATIONAL BANK OF BUTTE.

Order Fixing Date of Hearing Demurrer to Amended Complaint.

Now, at this day, on motion of Mr. Frank F. Freeman, of counsel for the above-named plaintiff, it is ordered that the hearing of this cause, upon the demurrer to the amended complaint herein be, and the same is hereby, set for Tuesday, February 6, 1906.

And afterwards, to wit, on Tuesday, the 6th day of February, 1906, the same being the 99th judicial day of the regular October term of said Court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2858.

February 6, 1906.

JOHN J. CAMBERS.

vs.

FIRST NATIONAL BANK OF BUTTE et al.

Hearing of Demurrer to Amended Complaint.

Now, at this day, comes the above-named plaintiff by Mr. Frank F. Freeman, of counsel, and the defendants by Mr. Joseph Simon, of counsel, and thereupon this cause comes on to be heard upon the demurrer to the amended complaint herein, and the Court, having heard the arguments of counsel, will advise thereof.

And afterwards, to wit, on Monday, the 26th day of March, 1906, the same being the 140th judicial day of the regular October term of said Court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2858.

March 26, 1906.

JOHN J. CAMBERS,

Plaintiff,

vs.

FIRST NATIONAL BANK OF BUTTE (a Corporation). ANDREW J. DAVIS and GEORGE W. ANDREWS,

Defendants.

Order Sustaining Demurrer to Amended Complaint.

This cause was heard by the Court upon the demurrer to the amended complaint herein, and was argued by Mr. Frank F. Freeman, of counsel for the above-named plaintiff, and by Joseph Simon, of counsel for the defendants herein. On consideration whereof, it is now here ordered and adjudged

twenty days from this date in which to amend his that said demurrer be, and the same is hereby, sustained.

Whereupon, on motion of said plaintiff, it is ordered that said plaintiff be, and he is hereby, allowed complaint herein.

And afterwards, to wit, on the 26th day of March, 1906, there was duly filed in said court an opinion, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN J. CAMBERS

vs.

THE FIRST NATIONAL BANK OF BUTTE, ANDREW J. DAVIS and GEORGE W. ANDREWS.

Opinion.

VEAZIE & FREEMAN, for Plaintiff.

DOLPH, MALLORY, SIMON & GEARIN, for Defendant Bank.

Omitting formal allegations, the complaint states, in brief, that on April 19, 1902, plaintiff had on deposit with the defendant bank $10,000, on which date he entered into a contract with defendants, which is made a part of the complaint; that on March 20,

1902, in the District Court of Silver Bow County, State of Montana, there was rendered a joint judgment in favor of William Lowery and others as plaintiffs against the plaintiff herein and Davis and Andrews as defendants, for the sum of $12,500, as recited in said contract, and that the liability of the defendants Davis and Andrews, and each thereof, on said bonds, is merged into said judgment; that by the terms of said contract, the defendant bank agreed to hold said deposit pending an appeal of the cause to the Supreme Court, and if the defendants Davis and Andrews should be required to pay such judgment, to indemnify them out of such deposit, but that if said defendants should not be required to pay said judgment, or any part thereof, then that it should return the same to plaintiff; that no appeal from said judgment was ever perfected, and none can now be taken; that within sixty days immediately prior to August 21, 1902, execution was issued upon said judgment, and placed in the hands of the sheriff, with directions to make the amount thereof as provided by law; that on said August 21, 1902, the sheriff "returned said execution, fully satisfied, to the clerk of said district court; that by the laws of the State of Montana then in force it became and was then the duty of said clerk to enter a satisfaction of said judgment upon the judgment docket of said court, and said clerk did thereupon, on said 21st day of August,

1902, duly enter a satisfaction of said judgment upon said judgment docket, and satisfy said judgment as to each and all the defendants in said cause, and said satisfaction, when so entered, constituted a full and complete satisfaction and discharge of said judgment, and the same was at said time fully satisfied and discharged"; that said satisfaction has never been vacated, and the time within which said judgment can be reinstated has long since passed; that defendants had or have not, nor have either of them, paid said judgment, or any part thereof, "nor are they or either or any of them liable to pay said judgment or any part thereof, nor can the same or any part thereof be enforced against them, or either or any of them"; that said sum of $10,000 is still on deposit with said defendant bank, which it has never repaid.

The contract, after reciting that Cambers had $10,000 on deposit with the bank, that Davis and Andrews had executed injunction bonds as sureties for Cambers, and that William Lowery and others had recovered judgment against Cambers, Davis, Andrews and others on such bonds, for $12,500, stipulates, among other things, that the $10,000 is to indemnify Davis and Andrews against any liability upon the injunction bonds, and that it may be used in assisting Cambers in securing a supersedeas bond on an appeal from said judgment, or during the pendency of a motion for a new trial; that said money

shall not be drawn by any of said sureties of Cambers pending the appeal, but shall remain on deposit to be paid to said sureties in repayment of any sum or sums which they may be required to pay; but in case there is no liability on the part of said sureties, or said Davis and Andrews, by reason of said injunction or stay bond, then that it shall be paid to said Cambers or his order.

The bank interposed a demurrer to the complaint, on the ground solely that it does not state facts sufficient to constitute a cause of action.

WOLVERTON, District Judge:

The question is whether this complaint is sufficient. Being tested by a demurrer, it should be construed most strongly against the pleader. Proceeding, therefore, under the rule, I will examine the complaint so far as it may seem necessary to dispose of the question before me.

The pleading should state facts, that is, those probative in character, and not legal conclusions. The conclusions are such as the Court must deduce from the facts spread upon the record.

The action is upon the contract of indemnity, set out by exhibit, entered into between Cambers on the one part and Davis, Andrews, and the First National Bank on the other; the purpose of the contract being that Cambers might furnish indemnity to Davis and Andrews against any liability they might have assumed by going upon the injunction bonds for him,

and for further indemnity in securing a supersedeas, which latter purpose does not now become material.

The bank occupies merely the position of a bailee of the fund deposited, to hold it under the conditions stated in the contract. It could not be called upon to dispose of it otherwise. So far as the bank is concerned, it therefore devolves upon the plaintiff to show that there is no liability yet remaining on the part of the sureties Davis and Andrews by reason of the injunction or stay bonds. The plaintiff has shown that the bonds have been sued on and a judgment obtained against the plaintiff Cambers and the defendants Davis and Andrews—indeed, the recitals of the contract establish as much—and that liability is thus shown against Davis and Andrews. The bank could not be called upon to deliver the fund to Cambers while such liability continues. The burden is therefore upon the plaintiff to show by apt allegations that Davis and Andrews have been relieved of that liability and the fund in bank liberated.

It is alleged that the liability of Davis and Andrews upon the injunction bonds has become merged into the judgment, and that henceforth the Court has to deal with the judgment alone. This may be granted.

Now, it was sought to show a satisfied judgment, and the process of such satisfaction is traced through an execution returned "fully satisfied" by the sher-

iff. This becomes the basis for the satisfaction of the judgment. What the clerk does under the Montana statutes, the effect of which is set out in the complaint, by way of satisfying the judgment is merely ministerial, and follows from the return of the execution, if it is shown thereby that the execution itself has been fully satisfied. This is legally deducible from the complaint. The return of the the sheriff on the execution should be a concise statement of facts, showing what he has done in pursuance of his authority, and not of any conclusions of law. The regularity and legality of his acts should thus be made to appear. 17 Cyc. 1366-1367. So that if the sheriff had levied the execution upon property, and sold the same, and made the amount of the writ, or any part thereof, the return should show these facts, and the money having been brought into court, or otherwise disposed of according to law, the clerk could enter such satisfaction of the judgment as the facts of the return and the disposition of the money made under the execution would warrant; but without the proper basis for satisfying the judgment, the clerk could not perform his ministerial act and enter satisfaction.

Again, "Payment of the amount of the debt for which an execution has issued either to the execution plaintiff, or to the proper officer, or to any other person authorized to receive payment, will operate as a complete satisfaction and discharge of the execution,

and when the payment is made to the officer, it makes no difference, as far as the defendant is concerned, that the money is not paid over to the plaintiff, the remedy of the plaintiff in such case being against the officer and the sureties on his official bond." 11 Am. & Eng. Ency. of Law (2d ed.), 713, 714.

Such being the law, I am of the opinion that it is a conclusion of law, and not the statement of a probative fact, to allege merely that said sheriff "returned said execution fully satisfied." If the sheriff made the money that is the amount of the judgment by levy upon property of the debtor, and sale thereof, and returned the same with the execution, which would be in satisfaction thereof, or if the money had been paid to the execution plaintiff, or to the officer, in satisfaction of the execution; or, going further, if the judgment had been settled out of court, and in pursuance thereof, or of any other agreement or understanding whereby it resulted in the plaintiff directing the execution to be returned satisfied the facts should have been alleged leading up to that result. Any of these would indicate a release of Davis and Andrews from liability upon the judgment, and the result would be deducible from the facts alleged. Not so under the present allegation, which is void of facts, being a mere conclusion of law. As I have seen, the satisfaction of the judgment, if satisfied at all, must result through a merely ministerial act of

the clerk on the satisfaction of the execution; but if the execution has not been shown by proper allegations to have been satisfied, then the judgment could not have been legally satisfied. So I conclude that the complaint does not state facts sufficient to show that the defendants Davis and Andrews have been relieved of their liability under the judgment obtained against them, and consequently to show that the bank has become accountable to plaintiff for the money placed on deposit with it. It should go further and state how the execution was satisfied. Several of the other allegations of the complaint quoted in the statement are also mere conclusions. The demurrer of the bank will, therefore, be sustained, and it is so ordered.

Filed March 26, 1906. J. A. Slanden, Clerk U. S. Circuit Court for the District of Oregon.

And afterwards, to wit, on Thursday, the 7th day of June, 1906, the same being the 52d judicial day of the regular April term of said Court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2858.

June 7, 1906.

JOHN J. CAMBERS

vs.

FIRST NATIONAL BANK OF BUTTE, ANDREW J. DAVIS and GEORGE W. ANDREWS.

Judgment.

Now, at this day, comes the plaintiff in the above-entitled cause, by Mr. F. F. Freeman, of counsel, and the defendant, the First National Bank of Butte, by Mr. Joseph Simon, of counsel, whereupon, said defendant moves the Court for judgment herein against said plaintiff; and it appearing to the Court that the demurrer filed by said defendant to the amended complaint of said plaintiff was sustained by this Court, and that said plaintiff has failed to amend his said complaint, or further plead herein, and it further appearing that said plaintiff does not desire to amend his complaint, or further plead in this cause,

It is considered that said plaintiff take nothing by this action; that said defendant go hence without day and that it have and recover of and from said plain-

tiff its costs and disbursements herein taxed at $41.90.

And afterwards, to wit, on the 7th day of August, 1906, there was duly filed in said court a petition for writ of error, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN J. CAMBERS,

Plaintiff,

vs.

FIRST NATIONAL BANK OF BUTTE (a Corporation), ANDREW J. DAVIS, and GEORGE W. ANDREWS,

Defendants.

Petition for Writ of Error.

The plaintiff above named, John J. Cambers, conceiving himself aggrieved by the judgment rendered in the above-entitled cause, on June 7, A. D. 1906, in the above-entitled court, complains and says that on the 7th day of June, 1906, this Court in the above-entitled cause entered judgment herein in favor of the defendant, First National Bank of Butte, and against this plaintiff, John J. Cambers, sustaining the demurrer of said defendant to the amended complaint of this plaintiff, and dismissing the plaintiff's

amended complaint herein with costs to the defendant, in which judgment certain errors were committed to the prejudice of this plaintiff, and whereby manifest error hath intervened to the great damage of the said plaintiff, all of which will more in detail appear from the assignment of error of the said plaintiff, which is filed with this petition.

Wherefore, the said plaintiff prays for the allowance of a writ of error, and that said writ of error may issue on his behalf to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of, and that said judgment be reversed and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Circuit Court of Appeals.

Dated August 6, 1906.

A. E. REAMES,
J. C. VEAZIE,
FRANK F. FREEMAN,
Attorneys for Said Plaintiff.

The foregoing petition for writ of error is hereby allowed this 7th day of August, 1906.

WM. H. HUNT,
Judge.

United States of America,
State and District of Oregon,—ss.

Due service of the within petition for writ of error is hereby accepted in Multnomah County, Oregon, in said district this 6th day of August, 1906, by receiving a copy thereof duly certified to as such by Frank F. Freeman, of the attorneys for the plaintiff, John J. Cambers.

DOLPH, MALLORY, SIMON & GEARIN,
Attorneys for Defendant, First National Bank of Butte.

Filed August 7, 1906. J. A. Sladen, Clerk U. S. Circuit Court for the District of Oregon.

And afterwards, to wit, on the 7th day of August, 1906, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN J. CAMBERS,
Plaintiff,

vs.

FIRST NATIONAL BANK OF BUTTE (a Corporation), ANDREW J. DAVIS, and GEORGE W. ANDREWS,
Defendants.

Assignment of Errors.

The plaintiff in error, John J. Cambers, in connection with his petition for a writ of error herein, makes the following assignment of errors, upon which said plaintiff will rely in the Circuit Court of Appeals for the Ninth Circuit for relief from the judgment rendered in the said cause on June 7, 1906, to wit:

I.

The Court erred in entering judgment in favor of the defendant and against the plaintiff, sustaining the demurrer filed by the defendant to the amended complaint in said cause.

II.

The Court erred in entering judgment in favor of the defendant and against the plaintiff that the amended complaint be dismissed with costs to the defendant.

Dated August 6, 1906.

A. E. REAMES,
J. C. VEAZIE,
FRANK F. FREEMAN,
Attorneys for Plaintiff.

United States of America,
District of Oregon,—ss.

Due service of the within assignment of errors is hereby accepted in Multnomah County, Oregon, in

said district, this 6th day of August, 1906, by receiving a copy thereof, duly certified as such by Frank F. Freeman, of the attorneys for plaintiff, John J. Cambers.

DOLPH, MALLORY, SIMON & GEARIN,
Attorneys for Defendant, First National Bank of Butte.

Filed August 7, 1906. J. A. Sladen, Clerk U. S. Circuit Court, for the District of Oregon.

And afterwards, to wit, on Tuesday, the 7th day of August, 1906, the same being the 103d judicial day of the regular April term of said Court—Present, the Honorable WILLIAM H. HUNT, United States District Judge for the District of Montana, presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2858.

JOHN J. CAMBERS,

Plaintiff,

vs.

FIRST NATIONAL BANK OF BUTTE (a Corporation), ANDREW J. DAVIS, and GEORGE W. ANDREWS,

Defendants.

Order Allowing Writ of Error.

Now, at this day, this cause comes on to be heard upon the petition of the plaintiff, John J. Cambers, for a writ of error and for the allowance thereof, said plaintiff appearing by Frank F. Freeman, Esquire, his attorney. And it appearing to the Court that the said plaintiff has filed his petition for a writ of error herein, and has herewith filed his assignment of error—

It is ordered that the said writ of error be, and the same is hereby allowed, and that a citation issue and be served as by law provided. It is ordered that the amount of the bond to be given by the said plaintiff, John J. Cambers, be fixed at the sum of five hundred dollars, with good and sufficient sureties to be approved by the Court or the Judge thereof, and the said bond when so filed shall operate as a supersedeas bond in said cause.

Dated August 7th, 1906.

WM. H. HUNT,
Judge.

Filed August 7, 1906. J. A. Sladen, Clerk U. S. Circuit Court for the District of Oregon.

And afterwards, to wit, on the 7th day of August, 1906, there was duly filed in said court a bond on writ of error, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN J. CAMBERS,

Plaintiff,

vs.

FIRST NATIONAL BANK OF BUTTE (a Corporation), ANDREW J. DAVIS, and GEORGE W. ANDREWS,

Defendants.

Bond on Writ of Error.

Know all men by these presents, that we, John J. Cambers, as principal, and the United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto the First National Bank of Butte, a corporation, in the sum of five hundred dollars, to be paid to said defendant, its successors or assigns, executors or administrators. To which payment well and truly to be made, we bind ourselves and each of us jointly and severally; and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated August 7th, 1906.

Whereas, the above-named John J. Cambers, plaintiff in the above-entitled cause, has applied for and obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment rendered in the above-entitled

cause by the Circuit Court of the United States for the District of Oregon, and a citation has issued as by law provided,

Now, therefore, the condition of this obligation is such that if the above-named John J. Cambers, the plaintiff, shall prosecute said writ of error to effect, and answer all costs and damages, if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

JOHN J. CAMBERS, [Seal]
By FRANK F. FREEMAN,
His Attorney.

[Seal of United States Fidelity & Guaranty Co.]
THE UNITED STATES FIDELITY AND GUARANTY COMPANY, [Seal]
By J. L. HARTMAN,
Its Attorney in Fact.

Signed, sealed and delivered in presence of us as witnesses:

K. V. LIVELY.
H. A. STEWART.

The within bond and surety are hereby approved August 7th, 1906.

WILLIAM H. HUNT,
Judge.

Filed August 7, 1906. J. A. Sladen, Clerk U. S. Circuit Court for the District of Oregon.

And afterwards, to wit, on Saturday, the 25th day of August, 1906, the same being the 119th judicial day of the regular April term of said Court—Present, the Honorable WILLIAM H. HUNT, United States District Judge for the District of Montana presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2858.

August 25, 1906.

J. J. CAMBERS

vs.

FIRST NATIONAL BANK OF BUTTE et al.

Order Extending Time to File Transcript.

Now, at this time, it appearing to the Court that there is not sufficient time in which the clerk of this court can prepare the transcript of record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in this cause, it is ordered that the time heretofore allowed in which to file said transcript of record in said Circuit Court of Appeals be, and the same is hereby, extended thirty days.

WILLIAM H. HUNT,

Judge.

Filed August 25, 1906. J. A. Sladen, Clerk U. S. Circuit Court, for the District of Oregon.

And afterwards, to wit, on the 2d day of October, 1906, there was duly filed in said court an order extending time to file transcript of record, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2858.

October 1, 1906.

JOHN J. CAMBERS,

vs.

FIRST NATIONAL BANK OF BUTTE, ANDREW J. DAVIS and GEORGE ANDREWS.

Order Extending Time to File Transcript.

Now, at this day, for good cause to the Court shown, it is ordered that the time heretofore allowed the above-named plaintiff in which to file the transcript of record in this cause, in the Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended thirty days.

WM. B. GILBERT,
Circuit Judge.

Filed October 2, 1906. J. A. Sladen, Clerk U. S. Circuit Court for the District of Oregon.

Clerk's Certificate to Transcript.

The United States of America,
District of Oregon,—ss.

I, J. A. Sladen, Clerk of the Circuit Court of the United States for the District of Oregon, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages numbered from 3 to 64, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of John J. Cambers, Plaintiff, and Plaintiff in Error, vs. First National Bank of Butte, a Corporation, Defendant, and Defendant in Error, as the same appear of record and on file in my office and custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Portland, in said District, this 2d day of October, A. D. 1906.

[Seal] J. A. SLADEN,
Clerk.

[Endorsed]: No. 1408. United States Circuit Court of Appeals for the Ninth Circuit. John J. Cambers, Plaintiff in Error, vs. The First National Bank of Butte, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the District of Oregon.

Filed November 20, 1906.

F. D. MONCKTON,
Clerk.

No. 1408

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

JOHN J. CAMBERS, *Plaintiff in Error,*

vs.

FIRST NATIONAL BANK OF BUTTE, a Corporation, ANDREW J. DAVIS and GEORGE W. ANDREWS, *Defendants in Error.*

Brief for Plaintiff in Error.

Upon Writ of Error to the United States Circuit Court for the District of Oregon.

A. E. REAMES,
FRANK F. FREEMAN,
Attorneys for Plaintiff in Error.

No. 1408

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

JOHN J. CAMBERS, *Plaintiff in Error*,

vs.

FIRST NATIONAL BANK OF BUTTE, a Corporation, ANDREW J. DAVIS and GEORGE W. ANDREWS, *Defendants in Error.*

Brief for Plaintiff in Error.

This is an action brought by the plaintiff against the defendant, the First National Bank of Butte, for the sum of ten thousand dollars and interest from August 21, 1902, at the rate of eight per cent per annum, and against the defendants Andrew J. Davis and George W. Andrews for interest on the said sum at the rate of six per cent per annum from April 19, 1902, and is brought to this Court on writ of

error from the judgment of the Circuit Court of the United States for the district of Oregon sustaining the demurrer of the defendant, First National Bank of Butte, to the complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action as against said defendant. The statement of the case may therefore be summarized from the allegations of the plaintiff.

Plaintiff alleges in substance as follows: That he is a citizen and resident of Oregon, residing in Jackson County therein, and that the First National Bank of Butte is a national banking corporation of Butte, Montana, and the defendants, Andrew J. Davis and George W. Andrews, are residents and citizens of Montana, the former being the President of the First National Bank of Butte.

That on March 20, 1902, in the District Court of Silver Bow County, Montana, there was made and entered a joint judgment in favor of William B. Hamilton, et al., as plaintiffs, against the plaintiff herein, John J. Cambers, and the defendants, Andrew J. Davis and George W. Andrews, defendants therein, for the sum of $12,500, upon two certain injunction bonds for the sums of $1,500 and $11,000, respectively, both of which bonds are mentioned in exhibit A, which was a contract attached to the complaint herein, and that thereby the liability of the said defendants, Andrew J. Davis and George W. Andrews, and each of them, upon said bonds was merged into said judgment.

That on April 19, 1902, the plaintiff had on de-

posit with the defendant bank at its place of business in Butte, Montana, and the defendant held in trust for the plaintiff, the sum of $10,000, and that on said day the plaintiff entered into a written contract, which is made a part of the complaint, with the defendants as parties of the second part, which contract in effect provided that the defendant bank should hold said deposit pending an appeal of the said case above mentioned to the Supreme Court of Montana, and that if the defendants, Andrew J. Davis and George W. Andrews, who had been sureties upon said injunction bonds, should be required to pay such judgment to indemnify them out of such deposit, but that if said defendants should not be required to pay said judgment or any part thereof, then that it should return the said sum of money to the plaintiff; that the said money should not be drawn out of the bank by any of the said sureties pending the appeal of the case, but should remain on deposit in the bank to reimburse the sureties for any sum which they may be required to pay as such sureties, and in case of no liability on their part by reason of said injunction bonds then to be paid to John J. Cambers, or his order; and the said Andrew J. Davis and George W. Andrews further promised and agreed to pay John J. Cambers interest on said sum at the rate of six per cent per annum so long as the same should remain on deposit in the said bank.

That the appeal from said judgment mentioned in the contract was never perfected and the time within which the same can be perfected has long

since gone by and no appeal can now be taken from said judgment.

That within sixty days immediately prior to August 21, 1902, an execution upon said judgment was duly issued and placed in the hands of the sheriff of Silver Bow County, Montana, with directions to make the amount thereof as provided by law; that on August 21, and before the time said execution under the Montana laws would have expired, and while the same was in full force and effect, the said sheriff returned said execution fully satisfied to the Clerk of the District Court in which the judgment was rendered; that under the laws of Montana then in force it was the duty of the Clerk of the Court to enter a satisfaction of said judgment upon the judgment docket of said court, and the Clerk did thereupon, on August 21, 1902, duly enter a satisfaction of said judgment on said judgment docket and satisfied said judgment as to each and all of the defendants in said case, and said satisfaction when so entered constituted a full and complete satisfaction in discharge of the judgment, and the said judgment was at said time fully satisfied and discharged; that by the laws of Montana then in force the entry of said satisfaction by the Clerk fully satisfied said judgment and relieved each of the parties against whom the said judgment had been entered from any liability thereon.

That said satisfaction of judgment has never been vacated, set aside or annulled, and by the laws then and now in force in Montana the time within which said judgment could have been reinstated or

the satisfaction thereof vacated has long since gone by.

That the said defendants herein have not nor had either or any of them paid said judgment or any part thereof prior to August 22, 1902, nor have they ever paid the same or any part thereof, nor are they or either of them liable to pay said judgment or any part thereof, nor can the same or any part thereof be enforced against either or any of them.

That the sum of $10,000 above mentioned is still on deposit with the defendant bank, and it has never repaid the same or any part thereof to the plaintiff, although demanded.

To the complaint the defendant bank interposed a demurrer upon the ground that the complaint did not state facts sufficient to constitute a cause of action as against it.

The demurrer was argued and Judge Wolverton filed an opinion in the Court below sustaining the demurrer upon the ground stated, and dismissing the complaint with costs to the defendant.

SPECIFICATION OF ERRORS.

The errors relied upon by the plaintiff are:

First: Error of the Court in sustaining the demurrer to the complaint.

Second: Error of the Court in dismissing the complaint herein with the costs to the defendant bank.

ARGUMENT.

The question then to be decided is whether or not a cause of action is stated by the plaintiff as against the bank. The contract and the complaint showed that Davis and Andrews were liable with Cambers upon the judgment against them for $12,500 and that their liability upon the injunction bonds had become merged in that judgment, and that the $10,000 deposited in the bank by Cambers was to indemnify them against this liability, and that when their liability upon that judgment ceased the bank agreed to return the $10,000 to Cambers.

It must, therefore, be shown by the plaintiff that this liability on the part of Davis and Andrews on the Hamilton judgment has ceased. The plaintiff has alleged in his complaint, and for the purposes of this argument it must be taken as true, that neither of the defendants herein have ever paid the judgment, so the bank cannot claim the right to hold the money on that score. The question then devolves upon the point as to whether or not Davis and Andrews are under any liability upon that judgment. The complaint alleges the issuance of an execution, that it was placed in the hands of the sheriff of Silver Bow County, Montana, and that he thereafter returned it to the Clerk of the Court fully satisfied, and that under the Montana laws then in force it was the Clerk's duty to enter a satisfaction of this judgment on the judgment docket, and that the Clerk did so, and that under the Montana laws the entry of that satisfaction fully satisfied the judgment and relieved each of the parties

against whom the judgment had been entered from any liability upon it. This was in August, 1902, and the complaint further shows said satisfaction has never been vacated, set aside or annulled, and that under the Montana laws the time within which the judgment could have been reinstated or the satisfaction thereof vacated, has long since gone by.

The learned judge in the Court below was of the opinion that the statements of the execution being returned fully satisfied and of the entry of satisfaction were statements of conclusions of law and not of probative facts, and that the complaint should go further and state how the execution was satisfied. (Record, pp. 38, 41 and 42.)

At the outset let us grant that for a **sheriff** to endorse upon an execution simply the words "wholly unsatisfied" and nothing more, or "fully satisfied" and nothing more, might be the **sheriff's** stating a conclusion of law. But this is not the question before us—we are not at this time concerned with the regularity or legality of the sheriff's official acts, for regularity and legality are presumed, (Murphree on Sheriffs, sec. 869) and in this case it would be for the defense to dispute and set aside this presumption, which, if they chose to do, would appear in the course of subsequent pleadings. The question is not "is it a conclusion of law for a sheriff to return an execution fully satisfied," but rather of this nature: In pleading an official act, must the pleader set up the act in detail, or is it sufficient to allege only the ultimate result.

Moreover, the averment under discussion must be segregated and distinguished from a class of allegations that are plainly conclusions on their face. For instance, it has been held that to aver "that an appraisement is valid," or that "an assignment is void," or that "an act is illegal," is to state merely a conclusion of law,—and there are numerous decisions of a similar nature. The averment with which the honored judge found fault was not a statement of an opinion merely, a conclusion that the pleader had formed in his own mind as to the satisfaction of the judgment, but a statement of fact —a statement that on a certain day the sheriff "returned said execution, fully satisfied, to the clerk of said district court,"—so satisfied that the said clerk entered the satisfaction of record, so satisfied that according to the laws of Montana, and of every other state, the judgment was fully discharged and all the parties thereto were relieved of their liability thereon—so satisfied that from that day, August 21, 1902, until February 7, 1905, a period covering approximately two and one-half years, the plaintiffs in execution did not see fit to have the said entry of satisfaction vacated, annulled or set aside, all of which facts appear in the amended complaint.

So far as we are able to discover, the exact averment under dispute has never come before the judicial notice of a court of final resort. Hence, we must seek our argument in parallels:

In pleading deeds, title, possession, etc., allegations of a very general character are universally admitted. For instance, the usual averment of posses-

sion runs after this fashion: "That at and during all the times herein mentioned, plaintiff has been and is now in possession of the said premises."

In deciding the case of Clarke v. Railway Co., 28 Minn. 71, Mitchell, J., says: "When a pleader alleges title to or ownership of property, or the execution of a deed in proper form, these are not statements of pure fact. They are all conclusions from certain probative or evidential facts not stated. They are in part conclusions of law, and in part statements of fact, or rather the ultimate facts drawn from those probative or evidential facts not stated; yet these forms are universally held to be good pleading."

In the case of Hanna v. Barker, 6 Colo. 303, there is an averment in the complaint that "The defendant made and entered into an agreement with the plaintiff," and counsel moved for non-suit. In commenting upon this, Beck, J., (page 312) says: "Counsel argue that even if it be said this averment covers a delivery of the agreement, then it is still insufficient because it is not an allegation of fact but a conclusion of law, which is not pleadable. This proposition is too refined. The same objection would apply to an allegation that the agreement was delivered, because delivery may have been actual, or it may have been constructive merely, and what amounts to a delivery is a question of law. Either averment, however, is that of an ultimate fact, which though a conclusion of law from the evidence is pleadable."

In pleading a judgment it is sufficient to say, after primary allegations of jurisdiction and the like, that "such proceedings were thereupon had that afterwards, by the consideration and judgment of the court, the plaintiff recovered the sum named." No details of the proceedings need be pleaded—the ultimate fact alone is required.

Now if it is sufficient to allege that "at and during all times herein mentioned plaintiff has been and now is in possession of certain premises," and if it is sufficient to say that "defendant made and entered into an agreement with plaintiff," and if it is sufficient to allege a judgment by saying that "such proceedings were thereupon had that plaintiff recovered a certain sum," why should it be declared insufficient to say that the sheriff "returned the execution fully satisfied"? Under such an allegation the return itself, disclosing what acts were performed by the sheriff leading up to his act of returning it, could be introduced in evidence to prove the ultimate fact we have alleged in the complaint.

A return itself is nothing more than evidence of the facts stated within it, and it is axiomatic that evidence need not be pleaded.

Why may we not follow the logic of Beck, J., (supra) when he reasons that delivery may have been actual or constructive, and that to aver that an agreement was delivered is a statement "of an ultimate fact, which though a conclusion of law from the evidence, is pleadable," and say that what amounts to full satisfaction is a question of law,

that there are a full half dozen ways of satisfaction, and to aver that an execution was returned fully satisfied is a statement of an ultimate fact, which, though partaking of the nature of a conclusion of law from the evidence, is pleadable.

The lower court in its opinion said: "As I have seen, the satisfaction of the judgment, if satisfied at all, must result through a merely ministerial act of the clerk on the satisfaction of the execution; but if the execution has not been shown by proper allegations to have been satisfied, then the judgment could not have been legally satisfied." . . . "The clerk could enter such satisfaction of the judgment as the facts of the return and the disposition of the money made under the execution would warrant; but without the proper basis for satisfying the judgment, the clerk could not perform his ministerial act and enter satisfaction." . . . "Such being the law, I am of the opinion that it is a conclusion of law, and not a statement of a probative fact, to allege merely that said sheriff 'returned said execution fully satisfied.'"

The foregoing excerpts from the court's opinion would seem to indicate that it is necessary when alleging a "satisfaction of judgment to show no liability," that the return on the execution, which is the basis upon which the clerk may exercise his ministerial act, must be set out in full in order to show a good cause of action.

Conceding, for the purpose of argument, that the allegation "returned the execution fully satisfied"

is a mere conclusion of law, it is the appellant's contention that in that light it should be treated as mere surplusage. The judgment having been alleged as satisfied, the legal presumption immediately arises in support of it that the ministerial officer did his duty, and if there is a lack of basis for the exercise of his act that fact is clearly a matter of defense.

The entry of a satisfaction of judgment on the record is in the nature of a receipt, and as such is prima facie evidence of a good, sufficient and legal satisfaction.

In support of the above proposition that a satisfaction of judgment is in the nature of a receipt, see the following cases and authorities:

Freeman on Judgments, Sec. 478a.

Dane v. Holmes, 41 Mich. 661.

Brown v. South Boston Sav. Bank, 148 Mass. 300.

Lewis v. Matlock, 3 Ind. 120.

Stewart v. Armel, 62 Ind. 593.

Lapping v. Duffy, 65 Ind. 299.

Lash v. Rendell, 72 Ind. 475.

Also see A. E. Enc., Vol. 19, p. 117, and note.

The fact as to whether or not the sheriff's return on the execution showed such facts as were a proper premise for the exercise of the clerk's ministerial act of satisfaction is no more required to be stated

in the complaint than are the facts tending to establish the truth or falsity of the return as set out by the sheriff. If the return is attacked the presumption is that it is true. "In such proceedings the return, however, is prima facie evidence of its own truthfulness."

Freeman on Executions, Sec. 367.

The legal presumption as to the truth and legality of the acts are as strong in the one case as the other. If the sheriff in executing the writ makes a false return thereon the clerk has no alternative, but must enter up the satisfaction or not, as the writ on its face directs. "Hence, if a writ be returned 'satisfied,' the clerk has no authority to issue an alias on the ground that the return of satisfaction was made by mistake."

Freeman on Executions, Sec. 364.

The legal presumption is that it is true and the burden of proving it otherwise is upon the assailant. Likewise if a clerk enters a satisfaction of record fraudulently, wrongfully, by mistake or without the proper premise for the exercise of that particular ministerial act, the presumption is in favor of the regularity and validity of his official or ministerial act. "It is a presumption of law that every one has conformed to the law, and the burden of proof is on him who alleges the contrary. This presumption operates in favor of the regularity and validity of official acts."

19 A. & E. Ency. Law, p. 43.

Where an officer makes a false return, it must, as between the parties to the suit, as long as it remains unvacated, be regarded as true.

Freeman on Executions, Sec. 364.

If we should ask why is it that judgments need not be set out in detail, one answer might be this: A cause once decided is res adjudicata between the parties thereto—they or their privies are bound by the decision until reversed by proper proceedings, and the presumption that all courts act regularly and legally renders a general allegation of the judgment all that is necessary.

A sheriff's return on an execution is also in the nature of res adjudicata—it is conclusive between the parties and those in privity with them; it cannot be set aside except for fraud, illegality or irregularity. The specific return in question, though two and one-half years had elapsed between its recording and the inception of this action, has never been legally set aside, as the amended complaint sets out.

In the case of McGregor v. Wells, Fargo & Co., 1 Montana 145, the Supreme Court of that state held that the court had no power to quash or annul, on motion, a return on evidence aliunde of irregularity, falsehood or illegality in the conduct of the sheriff. The remedy of the party aggrieved is an action against the sheriff. The plaintiffs in execution are bound by it conclusively. And since this is the fact, and since it is a legal conclusion that all official acts are regular, why should the plaintiff in this cause be required to set up more than the fact

that a return showing full satisfaction was made? To plead more would be to plead the evidence—to require more, in this and parallel cases, would tend to make all pleadings prolix and wearisome.

In Grinde v. Railway Co., 42 Ia. 377, a further light is shed on the controversy by Rothrock, J.: "It is not allowable to plead mere abstract conclusions of law, having no element of fact: they form no part of the allegation constituting a cause of action; but if they contain the elements also of a fact, construing the language in its ordinary meaning, then force and effect must be given to them as allegations of fact, as when necessaries are furnished to an infant, or when a deed or mortgage is alleged as having been made, or the ownership of property is asserted; the general allegation is sufficient, being the ultimate fact to be established by the evidence."

This narrows the question still further: Does the allegation that the sheriff returned the execution fully satisfied, when construed in the ordinary meaning of language, contain sufficient elements of a fact to justify this honorable Court in holding the complaint sufficient? To say that the sheriff returned the execution can be held nothing less than a fact; to say that he returned it fully satisfied, is describing generally the manner in which the execution was made, the specific manner of execution to be established by a submission of the return in evidence, provided the defense made issue on that point. True, the allegation is general in form; but the ultimate fact is there, and in the light of reason

and the citations above we believe the statement is sufficient—it is based on evidence to be declared on trial if necessary.

It appears to counsel for the plaintiff that pleading a sheriff's return of an execution fully satisfied, without stating that he sold some property or collected the money with which to satisfy it, can be no more a statement of a conclusion of law than pleading as a basis of complaint the execution and delivery of a promissory note, without stating that the plaintiff actually loaned the money for which the note was given. The note itself is only evidence of the transaction between the parties, but it is a sufficient fact upon which to base a complaint to recover the money for which it is given. Should the plaintiff be required, in pleading a return of a sheriff to the effect that the judgment is fully satisfied, to state just what action the sheriff took to collect the money, he should also be required, in pleading that a judgment was made and entered in a certain court on a certain day, to state the facts of the litigation leading up to that judgment. It appears to counsel that the return of the sheriff is an ultimate fact to be pleaded, and the manner in which the satisfaction of the judgment was brought about is only an incident in the proceedings, and evidence of the ultimate fact that the judgment was satisfied. A judgment may be satisfied in numerous ways aside from payment in cash or satisfied from levy and sale of property. If the plaintiffs in the Montana case had agreed with Davis and Andrews to release them in consideration of procuring their assistance in mak-

ing this judgment out of Cambers' property in Oregon, this fact would release Cambers. If in pursuance of that agreement, and under the direction of the plaintiffs' attorneys and the attorneys for Davis and Andrews, the sheriff returned the judgment as fully satisfied, the judgment would be as effectually extinguished as if the money had been paid. The plaintiff goes further in this case and pleads the entry of satisfaction upon the record, and until that satisfaction is vacated or annulled and the judgment reinstated of record no execution could be issued thereon as against Davis and Andrews.

In 17 Am. & Eng. Ency. of Law (2 ed.), p. 865, it is stated that the legal effect of the entry of satisfaction of a judgment is the extinguishment of the judgment debt. This being so, then the judgment against Cambers and Davis and Andrews is extinguished and the two last named are under no liability thereon, and under the contract with the bank the money deposited with it by Cambers should be returned to him. The clerk of the court, under the decisions cited in the work above mentioned, has no authority to vacate this entry of satisfaction. The complaint shows that according to the Montana laws the time for vacating or annulling it or reinstating the judgment has long since gone by, and the judgment must remain of record as a satisfied one. In any event, no judgment can be reinstated, even if the time for reinstatement were not restricted, without notice to all the judgment debtors whose rights would be affected by this reinstatement.

19 Ency. Pl. & Pr. 143, and cases cited.

If the demurrer in this case is sustained it would be within the power of the bank to hold the $10,000 belonging to Cambers for all time to come, neither paying it to Davis or Andrews or Cambers or to the judgment creditor in the Montana litigation. Supposing the judgment to have been satisfied by agreement between the parties, or any other way than by levy and sale of property or by actual payment in cash, and such satisfaction entered of record, counsel's argument would then be that this $10,000 must remain where it now is in the bank, because the plaintiff does not allege what action was taken by the sheriff leading up to the making of his return; and in such a case what specific acts could he enumerate in his return? Going further, supposing a judgment had been satisfied after the manner above set forth and no execution had been issued or returned, and by a direction of the plaintiff in that judgment the clerk entered up a satisfaction in accordance with that agreement, would not that entry of satisfaction be a fact to be pleaded, the legal effect of which is the extinguishment of the judgment debt? And when it is shown in addition to this that many years have elapsed since the record of satisfaction and that it cannot now be assailed, who can say that any of the judgment debtors are now liable thereon?

We respectfully submit that the decision of the lower Court should be reversed and the case brought on regularly for trial upon its merits.

A. E. REAMES,
FRANK F. FREEMAN,
Attorneys for Plaintiff in Error.

NO. 1408

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN J. CAMBERS,
Plaintiff in Error,

vs.

THE FIRST NATIONAL BANK OF BUTTE,
(A Corporation)
Defendant in Error.

Writ of Error to United States Circuit Court,
District of Oregon.

Respondent's Brief.

DOLPH, MALLORY, SIMON & GEARIN and
R. L. CLINTON,
Attorneys for Defendant in Error.

A. E. REAMES,
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ANDERSON & BURIWAY CO., PORTLAND, ORE

In the United States Circuit Court of Appeals.

JOHN J. CAMBERS,
Plaintiff in Error,

vs.

THE FIRST NATIONAL BANK OF BUTTE, a corporation,
Defendant in Error.

RESPONDENT'S BRIEF.

The case made by the plaintiff, as shown by his amended complaint, stripped of unnecessary verbiage, briefly is this: The plaintiff, having initiated certain litigation in the courts of Montana which required him to furnish injunction bonds aggregating in amount $12,500, applied to Andrew J. Davis and George W. Andrews (who are nominally defendants to this action) to become his sureties on such injunction bonds. To indemnify them for having done so, the plaintiff deposited with the defendant, the First National Bank of Butte, the sum of $10,000. The litigation referred to resulted adversely to the plaintiff, and a judgment was rendered against the

said plaintiff Cambers, and also against Davis and Andrews, his sureties, upon the injunction bonds executed by the latter for the sum of $12,500. Notwithstanding the fact that plaintiff has not paid the judgment recovered against Davis and Andrews on the injunction bonds, and as appears from the amended complaint, Davis and Andrews have either paid or are still liable for the amount of such judgment, the plaintiff by his complaint in this action seeks to recover from the defendant, First National Bank of Butte, a mere naked stakeholder, having no interest whatever in the controversy referred to, and sustaining no relations to the parties, other than as just stated, the money so deposited with the defendant bank as indemnity to Davis and Andrews. No attempt has been made, and none can be made, as both are non-residents of the State of Oregon, to obtain jurisdiction of the defendants Davis and Andrews.

Plaintiff, endeavoring to state his cause of action in his amended complaint as strongly in his favor as possible, has not alleged, although such is the fact, (and it must be apparent to the court from the pleadings in the case), that the judgment rendered in the Montana case on the injunction bonds has been paid by the sureties, Davis and Andrews. Plaintiff has not alleged in his amended complaint, nor was it contended on the argument that he had paid off such judgment or that he had in any way

secured for the defendants, Davis and Andrews, a release of the liability that they had assumed for plaintiff in executing the injunction bonds, and it is apparent from the amended complaint that the obligations of Davis and Andrews on the injunction bonds signed by them still continue, unless they have released themselves by paying off the judgment. It is also clear that plaintiff's object in prosecuting this suit, is to recover back the moneys deposited by him as security for his bondsmen without securing a release of the liability assumed by them for his (plaintiff's) benefit, and that plaintiff is seeking to cast on the bank the burden of litigating some real or supposed equity that he fancies himself to have against the defendants, Davis and Andrews, which matter, however, in no wise concerns the defendant bank.

A demurrer was filed on behalf of the defendant bank to the amended complaint, because the same did not state facts sufficient to constitute a cause of action against said defendant. This demurrer, after argument and due consideration by the court, was sustained, and the action dismissed.

To enable the court to understand the case more readily, we shall proceed to set out the plaintiff's alleged cause of action as shown by his amended complaint a little more fully:

The deposit of the $10,000 with the defendant bank is shown under the terms of the agreement

alleged in the original complaint. It is then alleged that on March 20, 1902, a joint judgment was rendered in the District Court of Silver Bow County, Montana, in favor of William B. Hamilton and others against Cambers, Davis and Andrews for the sum of $12,500, based upon the injunction bonds already mentioned, and that by the terms of the contract under which said money was deposited with the defendant bank, the said sum of $10,000 should be held pending an appeal in said cause to the Supreme Court of the State of Montana; and if the defendants, Davis and Andrews, were required to pay said sum of $12,500, or any part thereof, they should reimburse themselves out of said fund; but if said defendants were not required to pay said judgment, or any part thereof, then the bank should return to Cambers said sum of $10,000.

It is further alleged that the appeal from the judgment in the injunction case was never perfected and that no appeal can now be taken therefrom, that an execution was issued upon said judgment and on the 21st day of August, 1902, while the execution was in full force and effect, the sheriff returned said judgment fully satisfied, and the clerk entered upon the judgment docket satisfaction of the judgment. It is further alleged that the defendants have not paid any part of the Montana judgment, that they are not liable thereon, and that the same cannot be enforced against them.

These are substantially the allegations of the amended complaint. It will be observed that there is no claim made that plaintiff has paid off the judgment recovered against Cambers and his sureties, but it is sought to avoid the effect of Davis's and Andrews's liability on such judgment, by alleging as a conclusion, without any facts to support it, **that said defendants are not liable on such judgment.** The sole ground for this conclusion is that the sheriff of Silver Bow County, Montana, had inadvertently returned the execution as fully satisfied and the clerk of the court had entered upon the judgment docket satisfaction of such judgment. By an inspection of the original complaint in this action it will be observed that the return of the sheriff and the entry of satisfaction was an inadvertence and that no money had been paid for the release of the judgment, and that by a subsequent order of court the return of the sheriff was amended and the satisfaction of the judgment vacated. The plaintiff cannot escape the legal effect of these facts by eliminating them from the amended complaint filed. (See Judge Bellinger's opinion, 133 Fed. 975.)

In the original complaint the defendant bank was the sole defendant. A demurrer was also interposed to this complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and also because of a defect of parties,—the complaint itself showing that Davis and Andrews were

indispensable parties to the litigation. The demurrer being sustained upon both grounds, the amended complaint was filed, from which many of the allegations contained in the original complaint were omitted, and to which complaint the names of Davis and Andrews were added, without any particular reference to them and without making any charges or allegations against them or seeking any special relief against them.

In the construction of a pleading nothing will be assumed in favor of the pleader which has not been averred, as the law does not presume that a party's pleadings are less strong than the facts of the case will warrant.

4 Encyl. of Pl. & Pr., 746, 759.
39 Century Dig. Pl., Sec. 66.
Bartlett v. Prescott, 41 N. H. 493.
Hoag v. Warden, 39 Cal. 522.
Smith v. Buttner, 90 Cal. 95.
Stephens v. C. T. Co., 33 N. J. Law 229.

A pleading must state facts, not legal conclusions.

Mann v. Moorewood, 5 Sandf. (N. Y.) 557.
Losch v. Pickett, 36 Kans. 216.
Spargus v. Romin, 38 Neb. 736.
Gerrity v. Brady, 44 Ill. App. 203.
39 Century Dig. Pl., Sec. 12.

Payment of the amount of the debt for which an execution has issued, must be made to the execution

plaintiff or the proper officer. If an execution is returned as satisfied when for any reason there has been no satisfaction, the court may vacate the satisfaction and direct another writ to issue.

11 Am. & Eng. Encyl. Law, 713-4-5.

25 Am. & Eng. Encyl. Law, 780.

McCarthy v. O'Marr, 19 Mont. 215.

The return of a sheriff on an execution should be a concise statement of facts, showing what he had done in pursuance of his authority, and not conclusions of law. The regularity and legality of the acts of the sheriff should thus be made to appear.

17 Cyc. 1366-7.

ARGUMENT.

It seems hardly necessary to further discuss this case. The mere statement of it must be convincing that the plaintiff is entitled to no relief in a court of law against the defendant bank. The latter has no interest in the controversy between plaintiff and Davis and Andrews and is not involved in the acts and conduct upon which plaintiff bases his right to recover. The plaintiff must bring into court and litigate with the parties whose conduct he complains of and with whom he claims to have a controversy. Then, again, until plaintiff secures a release of the sureties upon the injunction bond signed for his benefit, or pays and secures satisfaction of the judgment rendered by the Montana court against Davis and Andrews, he is in no position to ask for the

return of the $10,000 deposited with the defendant bank. This is elementary, and involves a principle so familiar to the court that it is needless for us to cite authorities to sustain our contention.

Respectfully submitted.

DOLPH, MALLORY, SIMON & GEARIN and
R. L. CLINTON,

Attorneys for Defendant and Appellee.

No. 1407

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

CHARLES H. MERRIAM, as Registrar of Conveyances of the Territory of Hawaii,
Defendant in Error.

Brief of Defendant in Error, Charles H. Merriam, as Registrar of Conveyances of the Territory of Hawaii.

Upon Writ of Error to the United States District Court for the Territory of Hawaii.

E. C. PETERS,
Attorney-General of Hawaii,
For Defendant in Error.

No. 1407

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,
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CHARLES H. MERRIAM, as Registrar of Conveyances of the Territory of Hawaii,
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Upon Writ of Error to the United States District Court for the Territory of Hawaii.

E. C. PETERS,
Attorney-General of Hawaii,
For Defendant in Error.

No. 1407.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Plaintiff in error,

vs.

CHARLES H. MERRIAM, as Registrar of Conveyances of the Territory of Hawaii,
Defendant in error.

BRIEF OF DEFENDANT IN ERROR, CHARLES H. MERRIAM AS REGISTRAR OF CONVEYANCES OF THE TERRITORY OF HAWAII.

STATEMENT OF THE CASE.

On the 11th day of February, A. D. 1905, the United States of America filed in the District Court of the United States, in and for the District and Territory of Hawaii, its petition for condemnation of certain land for public uses then owned or claimed to be owned by J. W. Kawai and others. (Goverment's Exhibit No. 1, Record pages 129 to 141, both inclusive). On the 4th day of March thereafter, all the respondents, with the exception of J. W. Kawai and Maukuaole, his wife, filed their joint answer to said petition (Government's Exhibit No. 2, Record pages 142 to 148, both inclusive). J. W. Kawai and his

wife having failed to answer, a judgment upon default against them was duly and regularly entered in said cause on the 5th day of July A. D. 1905. (Government's Exhibit 3, Record pages 149 to 155, both inclusive). Of such judgment we will hereafter speak as the "Kawai" Judgment.

On the 14th day of July such other and further proceedings were had in said cause that a judgment was duly signed, entered and filed in said cause in favor of the petitioner and against the defendants and respondents who had answered, which judgment will hereafter be spoken of as the "Waterhouse" Judgment.

To the petition (Record page 86½), the "Kawai" Judgment (Record page 100) and the "Waterhouse" judgment (Record page 114) was annexed and made an inseparable part thereof a paper blue print map of the land subject to the proceedings. While the condemnation proceedings were pending, but before either the "Kawai" or "Waterhouse" judgment were obtained the legislature of the Territory of Hawaii, at its 1905 session passed, and on to wit, the 3rd day of April, A. D. 1905, was duly approved and then became law, Act 23 of the Session Laws for that year. The Act is as follows:

"Section 1. The Registrar of Conveyances shall, on "application accept and file in the archives of his office, "on the payment of a fee of one dollar, any plan of land, "but such plan must contain the name of the owner of "the land and his address, the maker's name and ad- "dress, the surveyor's name and address, date of survey, "scale, the meridian line, areas, name of Ili or Ahupuaa, "district and island, the true bearings and lengths of "principal lines, the names of all known adjoining own- "ers, and such data concerning the original title of the "land platted, as may be known. It shall be necessary "that one or more monuments shall be placed on the

"land which shall, if possible, connect with the Govern-
"ment triangulation system. All such monuments shall
"be placed as indicated on the plan.

Section 2. A description of the land platted shall "be written upon said plan, and all outside corners of "said tract shall be substantially marked by monu-"ments on the ground, where practicable; provided, "however, that in all cases where tracts of land are sub-"divided into lots, with the intention of conveying said "separate lots by lot number and reference to such plat, "it shall be necessary to show the true bearings and "lengths of a sufficient number of principal lines, and a "sufficient number of monuments shall be located on "the ground so as to accurately identify each lot.

"Section 3. All such plans must be on tracing cloth "of a size not greater than 36 by 42 inches, and the scale "thereof must be some one of the following, viz: 10 feet, "20 feet, 30 feet, 50 feet, 100 feet, 200 feet, 500 feet, 1000 "feet or 5000 feet to an inch.

"Section 4. It shall not be unlawful for the Regis-"trar of Conveyances to accept for record and record "any plan of land after this Act takes effect.

"Section 5. This Act shall take effect from and after "the date of its approval."

Thereafter, and on to wit the 1st day of August, A. D. 1905, the United States of America, by its duly authorized agent, offered to the respondent, as Registrar of Conveyances of the Territory, for recordation and requested that he receive for recordation and record as a whole a certified copy of the "Waterhouse" judgment, which the Registrar refused to receive for recordation or record, on the grounds that, if entitled to recordation as an entirety, the plan, drawing or blue print attached thereto did not comply with the provisions of Sections 1, 2 and 3 of said Act 23 in respect ,among other things, to the provisions there-

of requiring the plan to contain the name of the owner of the land and his address, meridian line, the name of the Ili or Ahupuaa, district and island, the true bearings of principal lines, data concerning original title of the land platted, and description of the land, and that the plan was not on tracing cloth of a size of 36x42 inches or less (see paragraph 4 of Answer, Record pp. 38 and 39); and further and more particularly that it was not his duty to receive the plan for record or even for filing for the reason that the Laws of the Territory made the receipt of such plan unlawful.

On the 9th day of October following, the United States instituted this proceeding.

BRIEF OF THE ARGUMENT.

No question was raised by the petitioner as to the propriety or legality of Act 23 of the Session Laws of 1905 other than that the Act is not applicable for the reason that it could not effect pending actions instituted prior to the approval of the Act and based its contention upon the following grounds:

(1) That Act 23 of the Session Laws of 1905 does not effect pending proceedings;

(2) That the law of the case is the law at the time of the inception of the case;

(3) That the legislation is retrospective;

(4) That statutes must operate prospectively; and

(5) That the construction of statutes is against retrospective legislation.

The several grounds raised can be practically treated together and considered as one objection to the applicability of the Act to the then pending action for condemnation, under the general objection that the same is retroactive legislation effecting vested rights, and the discus-

sion of this general objection covers the errors assigned by plaintiff in error, numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 14.

THE LOCAL LAW DEFINING THE PROCEDURE IN CONDEMNATION DOES NOT REQUIRE THE INCORPORATION OF A MAP IN THE FINAL ORDER OF CONDEMNATION.

Proceedings for condemnation instituted by the United States in its courts must conform to the local practice. Section 506 of the Revised Laws of Hawaii provides:

> "Section 506. Final order of condemnation. When "all payments required by the final judgment have been "made the court shall make a final order of condemna- "tion, which must describe the property condemned and "the purposes of such condemnation, a certified copy of "which must be filed and recorded in the office of the "Registrar of Conveyances; and thereupon the property "described shall vest in the plaintiff."

The section specifically provides what the final order of condemnation must contain and it makes absolutely no mention of a map. It only provides that there must be a description of the property condemned, and the purposes of the condemnation. Further than that it does not go. And the legal duty devolving upon the Registrar of Conveyances is to receive for recordation and record a certified copy of a final order which complies with Section 506. The plaintiff in error may contend that Section 499 impliedly requires that the final order of condemnation contain a map for the reason that by that section is provided that "a map must accompany the complaint, which shall correctly delineate the lands sought to be condemned and its location." Section 499 is as follows:

> "Sec. 499. Petition, defendants, different properties "in one action. Actions under and by virtue of this

"chapter, must be commenced by filing a petition and "issuing a summons thereon. All persons who are own- "ers or claimants of the property sought to be condemn- "ed must be joined as defendants; provided, however, "that in case the owner or claimant is unknown to "plaintiff, it shall be sufficient if the petition includes a "statement of that fact, and such defendant may be "joined in the petition under a fictitious name. This "petition must also contain a statement of the use to "which the land sought to be condemned is to be put "a description of each and every piece of land sought to "be condemned, and whether the same includes the "whole or only a part of an entire tract or parcel. A "map must accompany the complaint which shall cor- "rectly delineate the land sought to be condemned and "its location.

"All property necessary for any public use may be "united in one action."

But the section prescribing the contents of a petition cannot effect the section which applies to the final order of condemnation. Proceedings in condemnation are purely statutory. And being such they must be strictly complied with; but a provision concerning one stage of the proceeding cannot by implication be made applicable to another stage of the proceeding. The provision that a map must accompany the petition in addition to the description in the body of the petition of the piece of land sought to be condemned was obviously intended to give greater certainty to the pleading and the fullest data obtainable to the parties effected by the proceeding. On the other hand, Section 506 is intended to give both actual and constructive notice of the transfer of title and provides the method by which the successful petitioner in condemnation proceedings may comply with the Territorial law concerning the recordation of instruments effecting real property.

Even construing Section 506 not to exclude other material and pertinent matters which might legitimately be incorporated in the final order of condemnation, had Act 23 of the Session Laws of 1905 been in force and effect as law prior to the institution of the condemnation proceedings, it could not then be successfully contended that the provisions of the Act concerning the style and filing of maps would not effect a final order of condemnation, which contained a map delineating the land subject to the proceedings. So that whether in existence prior or subsequent to the institution of the condemnation proceedings, as long as the Act was in effect prior to the signing and entry of judgment, the question resolves itself into the one of whether or not a remedy or a vested right was effected by its passage.

ACT 23 OF THE SESSION LAWS OF 1905 NEITHER EFFECTS ANY VESTED RIGHTS NOR IMPOSES ANY LIABILITIES UPON THE UNITED STATES DIFFERENT FROM WHAT EXISTED PRIOR TO THE PASSAGE OF THE ACT.

The Act in question is not retrospective in its operation nor does it effect vested rights, nor does it impose additional liabilities upon the United States different from what existed prior thereto. It is simply an act effecting the procedure in a civil cause and became operative in its effect immediately upon its passage, both as to actions accrued prior to the passage of the Act, and actions pending at the time of its enactment. If it can be said that the Act is retroactive by reason of the fact that it effects an action, the right of which accrued prior to its passage, we may say, even though thus retroactive it is not objectionable. Retroactive legislation is not objectionable per se. It is only when in its retroactive operation it effects

vested rights or imposes new liabilities. A final order of condemnation after the passage of the Act without a map is and was just as good for the purposes of recordation under the registry laws as a judgment secured prior to the passage of the Act.

The judgment in the condemnation proceedings was not secured prior to the passage of the Act, but the proceedings were then pending, and the judgment was a matter of securement in futuro. And if there were a right to have as a portion of the final order a map, was such right one of property or one merely of procedure? The presence or absence of a map is certainly simply one of procedure for the reason that a final order after the passage of the Act without a map performs exactly the same function, by virtue of the recordation, as a final order of condemnation containing a map secured and recorded prior to the passage of the Act.

> "No person has a vested right in any course of pro-
> "cedure * * * he has only the right of prosecution
> "or defense in any manner prescribed for the time be-
> "ing or for the Court in which he sues; and if the stat-
> "ute alters that mode of procedure he has no other
> "right than to proceed according to the altered mode.
> "At best the statute can be considered as only effecting
> "procedure, and if retrospective ,it is only retrospective
> "to the extent of effecting the procedure relative to
> "judgment subsequently secured upon an antecedent
> "right of action and pending proceedings. Retrospect-
> "ive legislation is only obnoxious with reference to
> "statutes impairing rights existing at the time of their
> "passage, or creating new obligations, or imposing new
> "duties, or attaching new disabilities in respect to
> "transactions or considerations already passed."
>
> Sedg. Stat. Const., 188, cited with approval in Judd v. Judd, 125 Mich. 233.

"Statutes relating merely to the remedy for wrongs, "or causes of action existing at the time of their pass- "age, may be considered retrospective but not obnox- "ious."

The legislature has the power to abolish all remedies for causes of actions then existing and prescribe new ones in the same cases, and such statutes should be construed liberally to advance the remedy.

Sedg. on Stat. Const., 360.

There would be neither injustice nor oppression in this as there would be in the case of a statute which created a certain right or made an act a wrong which was not of that character when the statute was passed. Laws are deemed retrospective and objectionable which by retrospective operation destroy or impair vested rights or rights to do certain acts or possess certain things according to the law of the land. But laws which effect the remedy merely are not within the scope of the inhibition unless the remedy be taken away altogether or incumbered with conditions which would render it useless or impracticable to pursue it. There would not in the nature of the thing be a vested right to a remedy which existed at the date of the contract; in other words, the mode, times and manner of prosecuting suits must be left to the regulation of the legislative authority.

Phoenix Ins. Co. v. Shearman, 43 S. W., 1063.

An interesting case in this behalf is that of Judd v. Judd, supra. The plaintiff in that case was granted a decree of divorce from defendant and awarded the custody of one of the children of the parties. The decree in addition provided for the payment by defendant to plaintiff of seventy-five dollars per month as permanent alimony. Thereafter the legislature of Michigan enacted a statute which allowed punishment for contempt in cases of disobedience to decrees in divorce. Under such power

the defendant, on non-payment of alimony, was cited for contempt and an objection was made that the statute relative to contempts had no application to the final decree entered in the divorce matter; and therefore retrospective. The court said:

> "It is true the legislature cannot interfere with vested rights, but is the act in question an interference with vested rights; it does not change the amount of the decree, it does not increase the liability of defendant. It merely provides a remedy for the collection of a decree which defendant is legally and morally bound to pay."

Further the court cites with approval the following language found in Section 287 of Endlich on Interpretation of Statutes:

> "In this country the general rule seems to be in accordance with the English, that statutes pertaining to the remedy, that is, such as relate to the course and form of proceedings, for the enforcement of a right, but do not effect the substance of the judgment pronounced, neither directly nor indirectly destroy all remedy whatever for the enforcement of the right, are retrospective so as to apply to causes of actions subsisting at the date of their passage."

Again, in Henshall et al v. Schmidt et al, 50 Mo. 454-455, an original judgment of the court was rendered in 1860, but no execution was issued thereon until 1870, nearly ten years having elapsed. Objection was made to the issuance of the execution on the ground that notice to the adverse party had not been given under the original Act of 1860, and that execution had not been issued within five years as provided by that Act. It seems that by a subsequent statute of 1865, the motion in court and notice to adverse party were dispensed with and execution was

permitted to issue upon a judgment at any time within ten years. There the court said:

> "It is now insisted that while the judgment was "rendered, while the law of 1855 was in operation, the "issuance of the execution must be governed by that "law and that the legislature was incompetent to ex- "tend the time and release the conditions therein pres- "cribed. The contention is untenable. The rule that laws "are applicable to future and not to past transactions "is not infringed or violated by up-holding this law and "applying it to all judgments. It simply regulates for "enforcing judgments and does not trench on any vest- "ed rights."

In the case of Tremont & Sulfolk Mills v. City of Lowell, 165 Mass., 265, 266, a petition was, under the statute of 1890, filed for the reduction of the valuation of petitioner's property and an abatement of the tax assessed thereon. After going to the appellate court, the case was heard in the superior court upon petitioner's motion for interest on the amount of the abatement. During the time of process of appeal, and prior to the time of the motion for interest on the amount of the abatement, to wit, in 1895, a further statutory enactment went into effect providing that in any further judgment which should thereafter be rendered under the provisions of the statute of 1890, all charges should be included, and also interest on the amount of the abatement made from the date of the payment of the tax. Judgment was so entered in the superior court and to the ruling the respondent excepted. The court said:

> "In our opinion the exceptions must be overruled and "the judgment affirmed. The only question argued by "the respondent is as to the meaning of the statute of "1895. Respondent contends that it should be con-

"strued as applying only to judgments upon petitions "instituted after its passage. The plain answer to this "contention is that the explicit language of the statutes "is that such interest shall be included in every judg- "ment which shall hereafter be rendered for the amount "of an abatement of taxes made under the provisions "of Chapter 127 of the Acts of 1890. If the legislature "had intended the provisions to apply not to every judg- "ment for the amount of an abatement rendered after "1895, but only to judgments upon petitions for abate- "ment brought after that date, it would have said so."

A further case in which the amending law changed the remedy as to prospective judgment is that of County of Kossuth v. Wallace et al, 60 Ia., 508. There, Section 1873 of the code, which was in force at the time the mortgage in question was executed provided that in suits to foreclose a school fund mortgage, the court should give the plaintiff as a part of the costs such an amount as would be a sufficient compensation for the plaintiff's attorney in the case. This Act was amended in 1880 reducing the amount of attorney's fees to 10 per cent and in no case to exceed the sum of twenty-five dollars. There the court said:

"The change, we think, does not impair the obliga- "tion of the contract, but merely effects the remedy. "Statutes may constitutionally be enacted changing the "remedy existing when the contract was made if they "preserve the existing remedy in substance, and with "integrity, and do not destroy or embarrass the reme- "dies existing when the contract was made, so as to "substantially defeat the rights of the creditor."

See also Bensley v. Ellis, 39 Cal., 309, 313.

From the foregoing it is obvious that to the extent to which the statute is operative it must be considered only

as effecting the remedy and not vested rights. The rights of the United States at the time of the institution of the condemnation proceedings were that a certified copy of the final order of condemnation containing a description of the property condemned and the purposes for which it had been condemned, should be received and recorded by the Registrar of Conveyances. That right still prevails and whether either by law or custom there previously existed a right to include a map with the judgment, or have the judgment engrossed or upon parchment, or written in long hand, or on certain margins or blanks, is immaterial. The right which might accrue to the United States by virtue of the receipt and recordation of a final order of condemnation, to wit, the vesting of title and the consequent actual or constructive notice to third persons of the person in whom the title reposed, is still maintained to it, notwithstanding Act 23.

We respectfully submit that immediately upon the passage of Act 23, the United States authorities conducting the condemnation proceedings were bound to proceed according to the Territorial law, and if they desired to have as a part of their final order of condemnation, a map, it was their duty to see that the judgment complied with the laws of the Territory in force at the time of its signing and entry.

Act 23, immediately upon its becoming law, became operative as to all instruments presented to the Registrar for recordation. We are free to admit that it is a general act and does not contain words of amendment or repeal of any of the pre-existing provisions of law. It is general in its provisions and makes the recordation of a map by the Registrar unlawful. In view of its language it became operative as to final orders of condemnation as well as any other instruments permitted by law to be recorded, and all previous provisions of law applicable to

the receipt and recordation of instruments inconsistent with Act 23 were impliedly repealed to the extent of inconsistent portions thereof. No words of reference, amendment or repeal were necessary in Act 23. All previous laws inconsistent therewith, by virtue of the fact that Act 23 was the latest expression of the legislative will, must necessarily have been impliedly repealed.

Hickory Tree Road, 43 Pa. St., 139, 142.

On the 3rd day of April, 1905, Act 23 was as much a part and portion of the laws concerning proceedings in condemnation as the law pertaining to the registry of instruments effecting real property. Upon its approval a new method of procedure relative to final orders in condemnation was put into vogue and thereafter none could be recorded which contained a map as an inseparable part or portion thereof.

In this regard we desire to call the court's attention to the Pennsylvania case just cited. There six viewers had been appointed to view under the old law, and after the passage of a subsequent act providing for but three viewers, three viewers were appointed to view as directed by the act. The court held that the appointment of three was proper for the reason that the old law had been so far and in that respect changed by the repealing act; that the proceedings for damages were unchanged and that they proceed under the old law except as to the number of viewers.

To the same end is Davidson v. Wheeler, 1 Morris (Ia. Rep.) star page 238, top page 314. There the court said:

> "It was an action of replevin brought prior to but "tried subsequent to the passage or order of the present "replevin law. The proceedings on the trial should "therefore have been in accordance with the new law, "for it is a well settled rule that where the practice is "changed during the pendency of a suit, all subsequent

"proceedings as far as practicable conform to the new "laws."

See also Marks v. Crow, 14 Ore., 382, 387, where the court said:

"I think the rule should be, where the code is amend-"ed pending an action or suit, that the proceedings had "in accordance with the provisions thereof in force at "the time, should be held valid and that those taken "after the amendment goes into effect should be in con-"formity therewith."

And it is reasonable that the rule of law applied in the foregoing cases should apply to the case at bar. The evident intent of the legislature was to correct an evil which had previously existed—that of incumbering records with crude drawings in the attempt of the Registrar to make a "literal copy" of the instrument presented for recordation. It certainly was not the intent of the legislature, and no intention could be presumed from the act, to impair in any degree any rights which might accrue upon the recordation in the office of the Registrar of any instrument or instruments effecting the title to real property. And if the intention of the legislature clearly indicates that the statute is to be retroactive in its effect, to the extent of effecting accrued actions or pending proceedings, that intention of the legislature should be regarded and as far as practicable enforceed by the courts.

The better rule of construction and the rule peculiarly applicable to remedial statutes is that a statute must be so construed as to make it effect the evident purpose for which it was enacted; and if the reason of the statute extends to past transactions as well as to those in the future, then it will be so applied, although the statute does not in terms so direct, unless to do so would be im-

pairing some vested right or violating some constitutional guaranty.

Conn. Mutual Life Ins. Co. v. Talbot, 113, Ind., 373, 378.

Other cases in which remedial statutes have been held to effect pending proceedings are as follows:

S. Ind. R. R. Co. v. Paten, 157 Ind., 690, 693;
Winslow v. The People, 117 Ill., 152, 158;
Clarke v. Troy, 20 Cal., 220, 224;
Ralston v. Lothian, 18 Ind., 303, 305;
Logan v. Logan, 77 Ind., 558, 560;
Kille v. Reading Iron Works, 134 Pa. St., 225, 226;
Phoenix Ins. Co. v. Shearman (Supra);
Judkins v. Toffe, 21 Ore., 89, 91;
Burroughs v. Vandevier, 83 O., 383;
See Enc. of L., 2nd. Ed., vol. 26, p. 695, 696.

Our Supreme Court, in interpreting Section 5 of the Revised Laws of Hawaii, which provides that "no law shall have any retrospective operation," said, in the case of Peacock v. The Republic of Hawaii, 11 Haw., p. 404, 410:

"What are retrospective laws? The definition is not "wholly entymological; it is largely historical. To hold "that every law that 'looks backward' is unconstitu- "tional, would be absurd; it would tie the hands of the "Legislature so as to prevent all sorts of salutary laws "harmful to no one. 'Retrospective laws,' have, there- "fore, come to have much the same meaning as 'ex post "facto laws,' 'laws impairing the obligation of con- "tracts,' &c. While these phrases apply in whole or in "part to different subject matters, they in general "mean laws that impair vested rights; and in general "so long as laws do not impair vested rights they are "not unconstitutional because retrospective."

Ganging the case at bar by the simple yet extremely

potent language of the Peacock case, there can be no question of the validity of Act 23.

Counsel for the petitioner in this case, in the lower court, endeavored to sho wthat it had been the custom existing prior to the passage of Act 23, for the Registrar of Conveyances to receive and record instruments to which were attached maps or plats of real estate, upon the theory that there was a vested right accrued to the United States at the time of the institution of the condemnation proceedings, to file and have received for recordation a certified copy of the final order of condemnation, which contained a map of the property condemned. We objected upon the trial that it was absolutely immaterial what custom had theretofore prevailed, but over such object evidence was admitted to that effect. But even admitted that such was the custom, we respectfully submit that whatever right may have existed in the United States at the time of the institution of the condemnation proceedings that right is still maintained to it in a practically similar form. It is unlawful for the Registrar of Conveyances to accept for record and record any plan or map of land, but it is not unlawful for the Registrar to receive a map or plan properly prepared in accordance with the provisions of Sections 1, 2 and 3 of the Act, for the purpose of filing the same in his office. The United States can desire the presence of a map in the office of the Registrar of Conveyances for one purpose only—greater certainty in the final order of condemnation in the description of the premises subject to the order—fuller and more complete data of which to place third parties on notice under the provisions of the registry law. Had the United States authorities seen fit, they could have preserved unto the United States all for which they are now contending in this particular proceeding. The Act

went into effect before the United States had secured its judgment. The final order of condemnation, by appropriate language and references, could have made as a detachable part thereof, a map in compliance with the Act, and upon the recordation of the judgment, and the filing of the map, third parties would have been bound by all information as to title which the recorded judgment and the filed map would reasonably have led them. The only difference is that the United States, either in ignorance of or in a desire to perform its acts contrary to Act 23, secured a judgment to which, as an inseparable part thereof, was attached a map which did not comply with either Section 1, 2 or 3 of the Act, instead of securing a final order of condemnation which referred to a map which would, upon presentation, be entitled to filing. And this non-compliance is admitted by its failure to deny the allegations to that effect in respondents answer, and stands as undisputed in the case. Obviously nothing has been taken from the United States by the enactment of the provision relative to the filing of maps. By complying with its provisions the same rights, duties and liabilities attach to third parties upon recordation of a final order of condemnation referring to a filed map, the only difference being in the method by which recordation is secured. Why the authorities should prefer the method that they have adopted is difficult for us to imagine. No greater rights can be secured by the recordation of the final order in the shape in which it was presented. And either before the institution of these mandamus proceedings or this appeal petitioner could have amended its judgment in accordance with the provisions of the act, and still reserved to itself all rights previously existing either by law or custom.

THE LEGAL DUTY WHICH THE REGISTRAR OF CONVEYANCES MAY BE COERCED TO PERFORM IS TO RECEIVE FOR RECORDATION AND RECORD A FINAL ORDER OF CONDEMNATION AND NOT A JUDGMENT IN A CONDEMATION PROCEEDINGS.

We furthermore respectfully submit that the petitioner in this case is not entitled in any case to prevail. It is unnecessary to cite authorities upon the general proposition that mandamus will only lie to compel or coerce the public officer to perform a duty as prescribed by law. The instrument which is the subject of this action is not a final order of condemnation but a judgment secured in the condemnation proceedings. The local statutes distinguish between them and it is only the final order of condemnation that is entitled to recordation. Section 502 of the Revised Laws provides as follows:

"Sec. 502. Decision. The court shall have power to "determine all adverse or conflicting claims to the prop- "erty sought to be condemned and to the compensa- "tion or damages to be awarded for the taking of the "same."

Upon a decision the prevailing party secures his judgment. This is recognized by the provisions of Section 505 of the Revised Laws. It is as follows:

"Sec. 505. Payment of judgment, penalties. The "plaintiff must within two years after final judgment "pay the amount assessed as compensation or damages; "and upon failure so to do all rights which may have "been obtained by such judgment shall be lost to the "plaintiff; and if such payment shall be delayed more "than thirty days after final judgment, then interest "shall be added at the rate of seven per cent. per an-

"num. Such payment shall be made to the clerk of the "court rendering the judgment, who shall distribute "the same in accordance with the order of the court. If "the plaintiff shall fail to make such payment as afore-"said, the defendant shall be entitled to recover his "costs of court, reasonable expenses and such damage "as may have been sustained by him by reason of the "bringing of the action."

Under the provisions of Section 505 therefore, upon the securement by the petitioner of the "Waterhouse" judgment, it was its duty to pay into court the amount assessed as compensation for damages, and it was only upon such payment that under the provisions of Section 506 was it entitled to a final order of condemnation. It does not appear in this case that the assessed compensation for damages has ever been paid. As a matter of fact it has not. The instrument presented to the Registrar of Conveyances for the purposes of recordation was simply a final judgment. The United States has never as yet secured a final order of condemnation. And until it does secure such order it is not in a position to demand of the recording official that it place any other instrument upon record. It is the duty of the Registrar of Conveyances to receive a certified copy of the final order of condemnation, the contents of which comply with the provisions of Section 506. Further than that he need not go and the trial court was without jurisdiction to entertain this proceeding to coerce the Registrar to file a certified copy of a judgment under the provisions of the law pertaining to condemnation in contra-distinction to a final order of condemnation.

MANDAMUS DOES NOT LIE TO SECURE THE RECORDATION OF A DEED EXECUTED BY PARTIES RESPONDENT TO A PETITIONER IN CONDEMNATION PROCEEDINGS TRANSFERRING TO THE PETITIONER IN COMPLIANCE WITH A JUDGMENT IN CONDEMNATION THE PROPERTY SUBJECT TO THE PROCEEDING.

We desire at the outset to make an apology to the court. Under the assignments of error numbered 13, 15, 16, 17, 18 and 19, we take it that the plaintiff in error could ask this court to review, and it would review, the decision of the trial judge upon the respondent's plea to the jurisdiction. Under the rules of this court it is impossible, in the preparation of briefs here in Honolulu, to await the receipt of appellee's brief. The number of steamer calls at this port makes it obligatory upon the defendant in error or appellee to prepare his brief in advance so that it will be received by the Clerk in San Francisco within the time prescribed by the rules. We cannot say in advance that the plaintiff in error will not call to the attention of this Court the order of the trial judgment dismissing the petition as to the deed from the Waterhouse heirs to the United States, and therefore in an abundance of caution we present to this Court our points and authorities in that regard.

Section 629 of the Revised Statutes of the United States, Section 11 of the Act of September 24th, 1789, in defining the jurisdiction of the United States Circuit Courts, does not expressly include the authority to issue a writ of mandamus.

Riggs v. Johnson., 6 Wall., 166;
Knox v. Aspinwall, 24 How., 376;
Greene County v. Daniel, 102 U. S., 195;

Davenport v. County of Dodge, 105 U. S., 237;
Rosenbaum v. Bauer, 120 U. S., 450;
Bath Co. v. Amy, 13 Wall., 237;
State v. Lake Erie & W. Ry. Co., 85 Fed., 1.

Neither do the Revised Statutes of the United States, applicable to circuit and district courts, contain any express authority to issue a writ of mandamus.

Section 716 of the Revised Statutes of the United States (Section 14, Sep. 24, 1789), permits the issuance of "Writs not specifically provided for by Statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law."

Its issuance "must be necessary for the exercise of.... jurisdiction.

McIntyre v. Wood, 7 Cranch., 504 (1813).
McCluny v. Silliman, 2 Wh., 369 (1817).
Smith v. Bourbon Co., 127 U. S., 105, 112 (1887).

A writ of Mandamus cannot be used in the United States Circuit Court as an original writ.

Smith v. Jackson, Fed. Cas. No. 13064;
U. S. ex rel Weed v. Smallwood, Fed. Cas. No. 61315;
U. S. ex rel Seeger v. Pearson, 32 Fed., 309;
Hitchcock v. City of Galveston, 48 Fed., 640;
State ex rel City of Columbus v. C. & H. R. Co., 48 Fed., 626;
In re Bintschger, 50 Fed., 459, 461;
Gares v. M. W. & B. & L. Assn., 55 Fed., 209, 210;
U. S. ex rel Co. of Iron v. Severance, 71 Fed., 768;
U. S. v. The Judges, 85 Fed., 177.

Its issuance must be "agreeable" to the usages and principles of law"

Riggs v. Johnson Co. (supra);
Knox Co. v. Aspinwall, 24 How., 376 (1860).

USAGE AS EXECUTION.

In its function it is a substitute for execution.

Bath Co. v. Amy, 13 Wall., 244 (1871);
Green Co. v. Daniel 102, U. S., 187 (1880);
United States v. Schurz, 102, U. S., 378 (1880);
Louisiana v. Jumel, 107, U. S., 711, 727 (1882);
Rosenbaum v. Bauer (supra);
Heine v. Commissioners, 19 Wall., 655 (1873);
Graham v. Norton, 15 Wall., 427 (1872);
Davenport v. Dodge, 105, U. S., 235 (1881),
Stewart v. The Justices, 47, Fed., 482, 484;
Labette Co. v. Wanderly, 92, Fed., 314, 316;
U. S. ex rel Field v. Township of Oswego, 28 Fed., 55;
Thompson v. Perris Irrigation Dist., 116, Fed., 769;
Webber v. Lee Co., 6 Wall., 209, 210 (1867).

Principles relative to Mandamus must be present.

Riggs v. Johnson Co. (supra);
Labette Co. Commissioners v. U. S., 112, U. S., 217;
Lower v. United States, 91, U. S., 536;
Laird v Mayor of de Sotto, 25, Fed., 76;
Board of Commissioners Grand County v. King, 67, Fed., 202;
City of Cleveland Tenn. v. U. S., 111, Fed., 343, 349.

The duty the performance of which the writ requests must be clear and undisputable.

U. S. ex rel Boyton v. Blain, 139, U. S., 306;
U. S. v. Black, 128, U. S., 40.

Hereunto annexed may be found the local law of the Territory concerning eminent domain and registration of instruments effecting real and personal property.

It is respectfully submitted that the judgment of the lower courts should be sustained and that the appeal herein dismissed.

E. C. Peters.

E. C. PETERS,
Attorney General of Hawaii
for defendant in error.

CHAPTER 40.

EMINENT DOMAIN.

Sec. 491. Purposes for taking private property. Private property may be taken for the following purposes, which are declared to be public uses, to wit: sites for public buildings, fortifications, magazines, arsenals, navy yards, navy and army stations, light-houses, range and beacon lights, cemeteries, quarantine stations, pest-houses, hospitals, dumping places for garbage and refuse material, wharves, docks, piers, dams, reservoirs and bridges, also all necessary land over which to construct roads, canals, ditches, flumes, acqueducts, pipe lines and sewers; also all necessary land for the growth and protection of forests, public squares and pleasure grounds; also all necessary land for improving any harbor, river or stream, removing obstructions therefrom, widening, deepening or straightening their channels; also all necessary material for the construction of any public work.

Sec. 492. Only for public use. No property shall be taken by virtue of this chapter unless it shall appear that it is to be put to some public use, and that the taking is necessary to such use.

Sec. 493. Fee Simple may be acquired. A fee simple estate may be acquired for all the purposes mentioned in Section 491.

Sec. 494. What property may be taken. Property which may be taken by virtue of this chapter includes: All real estate belonging to any person or persons, or corporations, together with all structures and improvements thereon, franchises or appurtenances thereunto belonging, water, water rights and easements, also all property heretofore appropriated to some public use; provided, however, that in such case it must appear that

the use to which said property is sought to be put is a more necessary public use than that to which it has already been appropriated.

Sec. 495. Entering and surveying land. Any agent or servant to the Territory may, for the purpose of locating or surveying land to be condemned in accordance with the provisions of this chapter, enter upon the same and make examinations and surveys, and such entry shall not constitute a cause of action in favor of the owner of the land, except for damages resulting from negligence on the part of such agent.

Jurisdiction and Procedure.

Sec. 496. Circuit courts have jurisdiction. The circuit courts shall have power to try and determine all actions arising under this chapter, subject only to an appeal to the supreme court in accordance with law.

Sec. 497. Procedure as in civil actions. Where not otherwise expressly provided in this chapter, the procedure shall be the same as in other civil actions.

Sec. 498. Plaintiff. The superintendent of public works acting in his official capacity may institute proceedings on behalf of the Territory of Hawaii for the condemnation of property as provided for in this chapter and the superintendent of public works may be referred to in this chapter as the plaintiff.

Sec. 499. Petition, defendants, different properties in one action. Actions under and by virtue of this chapter, must be commenced by filing a petition and issuing a summons thereon. All persons who are owners or claimants of the properties sought to be condemned must be joined as defendants; provided however, that in case the owner or claimant is unknown to plaintiff it shall be sufficient if the petition includes a

statement of that fact, and such defendant may be joined in the petition under a fictitious name. The petition must also contain a statement of the use to which the land sought to be condemned is to be put, a description of each and every piece of land sought to be condemned, and whether the same includes the whole or only a part of an entire tract or parcel. A map must accompany the complaint which shall correctly delineate the land sought to be condemned and its location.

All property necessary for any public use may be united in one action.

Sec. 500. Notice. When the defendant or claimant of the land sought to be condemned is known, the summons shall be served by delivering to him a certified copy thereof, together with a copy of the plaintiff's petition. In case the defendant or claimant, although known, cannot be found it shall be sufficient to leave said certified copy with some agent or person transacting the business of the defendant or claimant, or by leaving the same at his last known place of business or residence. In case the defendant, although known, was never a resident of the Hawaiian Islands, or has removed therefrom, or if the defendant or claimant is unknown then the service of the summons upon such defendant or claimant may be made by publication thereof, in some newspaper published in the Territory of Hawaii, for such time as may be ordered by the court, not less than three months. The service of summons, as provided for in this section, shall be sufficient to give the court jurisdiction to proceed with and finally determine the case.

Sec. 501. Intervenors. Any person in occupation of or having any claim or interest in any property sought

to be condemned or in the damages for the taking thereof though not named in the complaint, may appear, plead, and defend in respect to his own property or interest, in like manner as if named in the complaint.

Sec. 502. Decision. The court shall have power to determine all adverse or conflicting claims to the property sought to be condemned and to the compensation or damages to be awarded for the taking of the same.

Sec. 503. Damages assessed, how. In fixing the compensation or damages to be paid for the condemnation of any property, the value of the property sought to be condemned and all improvements thereon, shall be separately assessed; and if the property sought to be condemned constitutes only a portion of a larger tract the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned, and the construction of the improvements in the manner proposed by the plaintiff shall also be assessed; and also how much the portion not sought to be condemned will be benefitted, if at all, by the construction of the improvement proposed by the plaintiff; and if the benefit shall be equal to the amount of compensation assessed for the property taken, and for damages by reason of its severance from another portion of the same tract, then the owner shall be allowed no compensation, but if the benefits shall be less than the amount so assessed as damages or compensation, then the former shall be deducted from the latter and the remainder shall be the amount awarded as such compensation or damages.

Sec. 504. Assessed as of day of summons. For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of summons, and its actual value at that date shall

be the measure of valuation of all property to be condemned, and the basis of damages to property by reason of its severance from the portion not sought to be condemned, subject however, to the provisions of Section 503.

No improvement put on the property subsequent to the date of the service of the summons shall be included in the assessment of compensation or damages.

Sec. 505. Payment of judgment, penalties. The plaintiff must within two years after final judgment pay the amount assessed as compensation or damages; and upon failure so to do all rights which may have been obtained by such judgment shall be lost to the plaintiff; and if such payment shall be delayed more than thirty days after final judgment, then interest shall be added at the rate of seven per cent. per annum. Such payment shall be made to the clerk of the court rendering the judgment, who shall distribute the same in accordance with the order of the court. If the plaintiff shall fail to make such payment as aforesaid, the defendant shall be entitled to recover his costs of court, reasonable expenses and such damage as may have been sustained by him by reason of the bringing of the action.

Sec. 506. Final order of condemnation. When all payments required by the final judgment have been made, the court shall make a final order of condemnation, which must describe the property condemned and the purposes of such condemnation, a certified copy of which must be filed and recorded in the office of the registrar of conveyances; and thereupon the property described shall vest in the plaintiff.

Possession Pending Appeal.

Sec. 507. By plaintiff, when; interest. At any time after judgment has been rendered in the circuit court

for or in favor of the plaintiff, or pending an appeal to the supreme court by either plaintiff, or defendant, the plaintiff may be put into possession of the land sought to be condemned upon the payment into the court of the amount assessed as compensation or damages; subject, however, to the payment of such further compensation or damages as may be subsequently awarded. Upon the payment of the money assessed as compensation or damages as aforesaid, the court shall make an order putting plaintiff into possession of the property sought to be condemned with the right to use the same during the pendency of and until the final conclusion of the litigation. The defendant who is entitled to the money paid into the court as aforesaid shall have the right to demand and receive payment of the same at any time thereafter, upon filing a receipt therefor, to the satisfaction of all claims on the lands sought to be condemned. Upon such payment being made to the defendant, the court shall make the final order of condemnation as provided for in Section 506.

If an order be made letting the plaintiff into possession, as provided for in this section, compensation and damages awarded shall draw lawful interest from the date of such order.

TITLE XX.

CONVEYANCES, ETC.

CHAPTER 151.

Registration of Conveyances.

REGISTRAR, DEPUTY, AGENTS TO TAKE ACKNOWLEDGMENTS.

Sec. 2352. Register, appointment, tenure. There shall be a bureau in the department of the treasury to be called the bureau of conveyances, and the governor shall appoint, upon the nomination of the treasurer, some suitable person to superintend said bureau, under the direction of said treasurer, who shall be styled the "registrar of conveyances," and hold his office at the pleasure of the governor.

Sec. 2353. Oath, bond. Said registrar shall take an oath faithfully to discharge the duties of his office, and he shall give to the treasurer, for the benefit of the public, a bond in the penalty of at least one thousand dollars, conditioned to answer to any party aggrieved, upon assignment thereof, for any damages, losses or injuries sustained by reason of his negligence, carelessness or misconduct in office or by reason of false certificates of search or incumbrance by him at any time made or given, to the detriment of the party prosecuting.

Sec. 2354. Deputy registrar, appointment, duties. The said registrar shall, under the direction of the treasurer, appoint a deputy, for whose official acts he shall be responsible, and whose appointment he shall cause to be announced in a newspaper or newspapers suitable for the advertisement of notices of judicial proceedings. It shall be the duty of such deputy to act as registrar of

conveyances, during the absence of the registrar, or in case of a vacancy in that office.

Sec. 2355. Agents to take acknowledgments, appointment. The said registrar may, under the direction of the treasurer, appoint suitable persons, throughout the Territory, as agents for taking and certifying the acknowledgment of instruments, to be recorded in his office.

DUTIES OF REGISTRAR.

Sec. 2356. Fees. The said registrar shall be entitled to demand and receive the following fees, viz.:

1. For the registry of any deed, lease, mortgage, or other instrument required by law to be recorded, or presented for record, fifty cents for one hundred words;

2. For taking any acknowledgment preparatory to registry, one dollar for each party signing;

3. For every copy of any instrument recorded in this office, authenticated by his seal of office, fifty cents for one hundred words;

4. For searching the records, and giving the certificate required by law, twenty-five cents for each year searched.

Such fees shall be paid into the public treasury weekly, and a monthly account thereof shall be rendered by the said registrar to the treasurer.

The registrar of conveyances shall receive such salary as may be appropriated by the legislature.

Sec. 2357. Attested copies, certificates. The registrar of conveyances shall, when applied to therefor, furnish an attested copy of any instrument or document recorded in his office, and he shall also give certificates of search or incumbrance, or of any fact appearing upon

his records, upon being paid the fees hereinbefore specified.

Sec. 2358. Recording, method. It shall be the duty of the registrar of conveyances to make an entire literal copy of all instruments required to be recorded in his office, in books suitable for that purpose, which shall be provided by the treasurer, and at the foot of said copy certify its correspondence with the original, after which he shall certify upon the exterior, or indorse upon said recorded instrument, the date of its registry, the book in his office in which, and the page of said book at which it was registered.

Sec. 2359. Order of recording. Every instrument entitled by law to be recorded, shall be recorded in the order, and as of the time when the same shall be delivered to the registrar for that purpose, and shall be considered as recorded from the time of such delivery.

PREREQUISITES TO RECORDING.

1. Stamps.

Sec. 2360. To be affixed. It shall not be lawful to record any conveyance, or other instrument required by law to be stamped, unless the same shall have been previously stamped, as provided in Chapter 101.

2. Acknowledgments.

Sec. 2361. How made; proof if not made. To entitle any conveyance, or other instrument to be recorded, it shall be acknowledged by the party or parties executing the same, before the registrar of conveyances, or his agent, or some judge of a court of record or notary public of this Territory, or before some notary public or

judge of a court of record in any foreign country. But if any party to an instrument executed within this Territory shall die, or depart from the Territory without having acknowledged his deed, or shall refuse to acknowledge it, the deed may be entered of record on proof of its execution by a subscribing witness thereto, before any judge of a court of record of this Territory. If all the subscribing witnesses to such conveyance or other instrument shall be dead or out of the Territory, the same may be proved before any court of record in this Territory by proving the handwriting of the grantor and any subscribing witness.

Sec. 2362. Identification of person making. No acknowledgment of any conveyance or other instrument, whereby any real estate is conveyed or may be affected shall be taken, unless the person offering to make such acknowledgment shall be personally known to the officer taking the same to be the person whose name is subscribed to such conveyance or instrument as a party thereto, or shall be proved to be such by the oath or affirmation of a credible witness known to the officer.

Sec. 2363. Certificate, contents. The certificate of such acknowledgment shall state the fact of acknowledgment and that the person making the same was personally known to the officer granting the certificate to be the person whose name is subscribed to the instrument as a party thereto, or was proved to be such by the oath or affirmation of a credible witness known to the officer whose name shall be inserted in the certificate.

Sec. 2364. Form when person known. Such certificate shall be substantially in the following form, to wit:

Island of ..... }
Territory of Hawaii, } ss.

On this.....day of....., A. D. ....., personally appeared before me A. B., known to me to be the person described in and who executed the foregoing instrument, who acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein set forth.

Sec. 2365. Form when person unknown. When the person offering the acknowledgment is unknown to the officer taking the acknowledgment, the certificate shall be substantially in the following form, to wit:

Island of..... }
Territory of Hawaii, } ss.

On this.....day of....., A. D. ....., personally appeared before me A. B., satisfactorily proved to me to be the person described in and who executed the within instrument, by the oath of C. D., a credible witness for that purpose, to me known and by me duly sworn, and he, the said A. B., acknowledged that he executed the same freely and voluntarily for the uses and purposes therein set forth.

Sec. 2366. No other certificate valid. No certificate of acknowledgment contrary to the provisions of Sections 2362-2366, 2369 shall be valid in any court of this Territory, nor shall it be entitled to be recorded in the registry of public conveyances.

But no certificate of acknowledgment executed before July 29, 1872, shall in consequence of anything in said sections contained be deemed invalid.

Sec. 2367. Acknowledgment of release of dower. It shall not be lawful to enter of record any release of

dower in lands or other property, signed by an undivorced wife, without her previous acknowledgment to the registrar of conveyances, or one of his agents, or some officer authorized to receive such acknowledgment, apart from her husband, that she had signed such release without compulsion, fear or constraint from her husband.

Sec. 2368. Certificate, indorsed on instrument. Every officer who shall take the acknowledgment or proof of any instrument, shall indorse a certificate thereof, signed by himself, on the instrument, and in cases of proof give the names of the witnesses examined before him, their places of residence, and the substance of the evidence by them given.

Sec. 2369. Penalty for false certificate. Any officer authorized to take acknowledgments to instruments who shall knowingly incorporate in the certificate of acknowledgment any false or misleading statement as to the facts therein contained, shall on due proof thereof, be punished by fine not to exceed one hundred dollars, or by imprisonment at hard labor not to exceed two months, or both. Nothing in this section contained shall be construed to do away with the liability for civil damages for such act.

3. Interlineations, Erasures, Etc.

Sec. 2370. Noted in instruments. It shall be the duty of every notary public or the officer authorized to take acknowledgments to instruments, before taking any acknowledgment, to first carefully inspect any instrument proposed to be acknowledged before him, and ascertain whether there are any interlineations, erasures or changes in such instrument. If there are any such interlineations, erasures or changes, he shall call the attention thereto of the person offering to acknowledge

such instrument, and if they are approved by such person, the said acknowledging officer shall place his initials in the margin of said instrument opposite each such interlineation, erasure or change, and shall note at the foot of instrument before the acknowledging clause what each such interlineation, erasure or change consists of, and the number of the page and line on which it occurs.

Sec. 2371. Penalty for not noting. Every notary public or other person authorized to take acknowledgments to instruments who shall take the acknowledgment of any person to any instrument in which there are interlineations ,erasures or changes, and who shall fail to observe or perform the requirements, of any of them, of the last preceding section, shall be liable, upon conviction thereof, to a fine not to exceed the sum of two hundred dollars.

Sec. 2372. Not recorded unless noted. No instrument in which there are interlineations, erasures or changes shall be recorded by the registrar of conveyances, unless the same are duly initiated and noted by the officer or officers taking the acknowledgment or acknogledgments to the same.

Sec. 2373. Noted in record. Each and every interlineation, erasure or change made in any record in the office of the registrar of conveyances, shall be initialed in the margin by the registrar or his deputy, and the interlineation, erasure or change made shall be noted at the foot of the record in the handwriting and over the signature of the registrar or of his deputy.

RECORDS OF ACKNOWLEDGMENTS.

Sec. 2374. To be kept. All judges and other officers authorized by law to take acknowledgments to instruments, besides the certificate of acknowledgment in-

dorsed upon the instrument, shall keep a record of every acknowledgment in a book of records. Each record shall set forth at least the date of acknowledgment, the parties to the instrument, the persons acknowledging the date and some memorandum as to the nature of the instrument acknowledged.

Sec. 2375. Disposition of records. The books of record so kept shall every five years beginning with July 1, 1893, and upon the resignation, death or removal from office of such judge or other officer, be deposited with the clerk of the court of record nearest the place where such judge or other officer resided.

Sec. 2376. Same, open to inspection. The clerks of the several courts of record shall carefully preserve the books of record deposited with them as provided herein, filing the same with the records of the court. Such records, both while in the custody of such acknowledging officers and after such filing, shall be open at all reasonable times to the inspection of any responsible person, without fee or reward.

Sec. 2377. Penalty for not keeping. Any of the officers to take acknowledgments aforesaid, who shall fail to keel the record herein directed, or upon failure to deposit the same with a clerk of a court of record as directed shall be liable to pay a fine of not less than fifty dollars nor more than two hundred and fifty dollars, which may be recovered of such officer, his executors or administrators.

EFFECT OF STAMPING, ACKNOWLEDGING, RECORDING, NOT RECORDING.

Sec. 2378. Instruments may be recorded; as evidence. Every conveyance or other instrument, stamped and acknowledged or proved, and certified in the manner

hereinbefore prescribed, by any of the officers before named, may be read in evidence without further proof thereof, and shall be entitled to be recorded.

Sec. 2379. Record or copy as evidence. The record of an instrument duly recorded, or a transcript thereof, duly certified, may also be read in evidence, with the like force and effect as the original instrument. Neither the certificate of acknowledgment, nor the proof of any instrument, shall be conclusive, but may be rebutted, and the force and effect thereof may be contested by any party affected thereby. If the party contesting the proof of an instrument shall make it appear that such proof was taken upon the oath of an interested or incompetent witness, neither such instrument nor the record thereof shall be received in evidence until established by other competent proof.

Sec. 2380. Effect of not recording deeds, leases, etc. All deeds, leases for a term of more than one year, or other conveyances of real estate within this Territory, shall be recorded in the office of the registrar of conveyances, and every such conveyance not so recorded shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, not having actual notice of such conveyance, of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded.

Sec. 2381. Chattel mortgages, etc. All mortgages of chattel property, indentures of apprenticeship, articles of marriage settlement, powers of attorney for the transfer of real estate within this Territory, and agreements of adoption, shall, in order to their validity, be recorded in the office of the registrar of conveyances, in default of which no such instrument shall be binding to the detri-

ment of third parties, or conclusive upon their rights and interests.

Sec. 2382. Old records, etc., valid. All records of instruments made in the office of the registrar of conveyances, anterior to the tenth day of July, A. D. 1850, whether in the book required by law or otherwise, shall be deemed to have been duly recorded.

All conveyances of real and personal property made and executed anterior to April 27, 1846, and all pledges of property, real or personal, executed anterior to said date, the conditions of which had not been fulfilled before the promulgation of the act of April 27, 1846, shall, if not recorded in the office of the registrar of conveyances at the instance and expense of the grantee or mortgagee, within ninety days after said promulgation, be void in law as against subsequent grantees and mortgagees of the same property, not having notice of the existence of such previous conveyances or pledges.

E. C. Peters
Atty General of Hawaii
for dept in Emm
W. F. Porter
Deputy Atty General